THE

GOVERNMENT

AND

LAWS

OF

NEW HAMPSHIRE

BEFORE THE ESTABLISHMENT OF THE PROVINCE.

1623-1679.

A MONOGRAPH CONSTITUTING THE INTRODUCTION TO THE FIRST VOLUME OF THE PROVINCE LAWS

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INTRODUCTORY NOTES.

THE STATUTE LAW AS DEVELOPED AT THE TIME OF THE COLONIZATION OF NEW ENGLAND.

The statutory law of England in its later structure commences with the Magna Charta, which King John conceded under compulsion at Runnymead in 1215, which Henry the Third confirmed in 1225, and which Edward the First sealed with the Great Seal of England at Ghent on the 5th of November, 1297. The authorities generally agree at this point. The principles embodied in the first Magna Charta were contested during a long period subsequent to the date of King John's concession. The confirmations which are named as those of Henry the Third and Edward the First were not the only ones that were required and obtained before the Great Charter was universally recognized in the form and terms in which it became permanent. As a parliamentary act Magna Charta takes date as of 25 Edward the First, A. D. 1297.[1] The text of the Magna Charta of John, 1215, is represented in facsimile in the Statutes of the Realm, as also are other and later drafts of the instrument.[2] These charters take their place within what is called the "time of legal memory." That term is employed as descriptive of the period in and since the reign of Richard the First, 1189-1199. There is very little extant in authentic form that is assignable to the first part of this so-called "time of legal memory," except the charter of John and the other great charters, with possibly a few isolated statutes. As to these it may be said on the authority of Sir Matthew Hale[3] that there was great confusion until in Magna Charta of Henry the Third, 1225, they obtained a full settlement, and the substance of them was solemnly enacted by parliament. Important changes transpired from time to time in the text of the Great Charter. Repeatedly the confirmations were compulsory.[4] That there had been more than thirty of these confirmations of Magna Charta before the time of Henry the

[1]Statutes of the Realm, ed. 1810, vol. 1, p. 114.

[2]Statutes of the Realm, ed. of 1810, pp. 6, 22, *et seq.*

[3]Sir Matthew Hale, History of the Common Law, ed. 1794, p. 5, quoted in Finlason's Reeve, vol. 1, p. 1, note B.

[4]Pollock and Maitland, vol. 1, p. 157.

Fifth, 1413, is an indication of the practical insecurity of the rights conceded by the terms of the instrument.[1] The charter takes its place as the first chapter of the enacted law.[2] "The first set of laws," remark the authors of the History of English Law before the Time of Edward the First, "which in later days usually bears the name of 'statute,' is the Provisions of Merton issued by the king, with the consent of the prelates and nobles, in 1236." From the reign of Henry the Third, 1216-1272, no statute roll nor any rolls of parliament are preserved, and it is not supposed that any such records were kept. The earliest statute roll now extant began with the Statute of Gloucester in 1278. The first Parliament Roll comes from 1290.[3] From the time of the confirmation of Magna Charta, 9 Henry the Third, 1225, to the time of Edward the Third, 1327, a considerable number of acts of parliament are preserved, but it is from the latter reign that the statutes exist in a regular series to the present.[4]

The system of statutory law which had been embodied in acts of parliament actually enrolled and accessible at the time of the first planting of English colonies in New England was not of remarkable antiquity. From 460 B. C., the date to which the enactment of the Twelve Tables is assigned, nearly a thousand years had elapsed before Justinian, in 534 A. D., had consolidated the body of the Roman law into the Institutes, Pandects, and Code. From the beginning of the permanent occupation of Britain by the Romans to the Magna Charta of Henry the Third was a period of almost twelve hundred years. The Roman law was administered to a certain extent in England from about A. D. 50 to about A. D. 450.[5] Through the operation, centuries later, of entirely different influences, the Roman law, as it survived in the forms and principles of the civil and canon law subsequent to the Norman conquest, was brought into contact with the government and affairs of the people of England. It is not now open to question that the influence of Roman laws was productive of important results upon legal usages, procedure, and case law. In the then existing environment it would be inevitable that the learning of those who were masters of the Roman law would be manifest in the *lex scripta*, as the statutes took form in the early stages of their development into a permanent system.[6] The Saxon suprem-

[1]Hume, History of England, vol. 2, 268; Bouvier, Law Dictionary, 14th ed., vol. 2, p. 87.

[2]Pollock and Maitland, vol. 1, p. 157; 9 Hen. 3, c. 29, in Ruffhead.

[3]*Id.*, vol. 1, pp. 158, 159.

[4]Finlason's Reeve, ed. 1869, vol. 1, p. 1.

[5]Finlason's Reeve, vol. 1, pp. xxxix, 3, Note B; Amos, Science of Law, p. 380; Hadley, Introduction to Roman Law, 18.

[6]Pollock and Maitland, History of English Law before the Time of Edward I, vol. 1, chap. 4; Finlason, Introduction to Reeve's History of English Law, ed. 1869, vol. 1, p. lxxxix; Amos, Science of Law, pp. 9, 10.

acy was the occasion for the institution of other laws and the evolution of other customs, which in their order entered into the foundation upon which, in a later period, a permanent system was established.[1] The Norman conquest also introduced other controlling factors distinct from both the Roman and Saxon law, related to the establishment and development of legal institutions and of positive law. All these laws, whether institutions, codes, charters, royal edicts, or customs, which are assignable to any time prior to the reign of Richard the First, and whether of aboriginal Brittonish, Roman, Saxon, Danish, or Norman origin, are, however, according to Sir Matthew Hale, accounted *lex non scripta.* It may be noted that the parliament assembled by Leicester in 1265 was the one to which both the knights of the shire and the representatives of the boroughs were summoned. This is regarded as the first meeting of the House of Commons.[2] While it is conceded that the beginning of a continuous series of recorded (manuscript) parliamentary laws is assignable to the reign of Edward the Third, 1327-1377, it was not until near the close of the reign of Edward the Fourth, 1483, that the invention of printing, in connection with practical business uses, was introduced into England. The permanent and successful establishment of mills in England for the manufacture of paper is of about the same date as the introduction of printing as a trade, that is, in the latter part of the fifteenth century, although it had previously been prosecuted on the continent during an indefinite period. The first book certainly known to have been printed in England bears the date 1477. Among the considerable number produced in the next fifteen years was a volume containing the laws of Richard the Third, 1483-1485,[3] printed in French, besides several other volumes of statutes or compilations both of earlier and later date than those of Richard the Third.[4] The publication of the laws of England in printed books, therefore, was anterior to the planting of the English colonies of New England by less than one hundred and fifty years. Even after 1327, the date which is regarded as marking the beginning of a regular series of English parliamentary statutes, there was much which stood in the way of a general diffusion of knowledge as to the provisions of that body of law. The acts were engrossed in Latin or French until the time of Henry the

[1]Thorpe's Ancient Laws and Institutions of England from Æthelberht to Cnut with English Translations, etc., 2 vols., Public Records Commission, 1840.

[2]Stubbs, Constitutional History of England, vol. 2, 4th ed., sec. 177, p. 96; Hume's History of England, vol. 2, p. 53.

[3]Encyc. Brit., vol. 8, p. 413; De Vinne, Invention of Printing, 508.

[4]Statutes of the Realm, ed. of 1810, Catalogue of Printed Collections, etc., constituting Appendix A to the Introduction to that work. The same catalogue is reproduced in this volume, *post*, pp. 726 *et seq.*, and is designated as Appendix A, II.

Seventh, 1485. Pollock and Maitland give a succinct account of the conflict which continued in England for centuries between the Latin, French, and English languages, resulting in the transition from French to English statutes that occurred suddenly at the accession of Richard the Third, and which seems to be contemporaneous with a change in the method of enrollment. To the very last, 1503, in the time of Henry the Seventh, the formal parts of the Roll are written either in French or in Latin.[1]

The first compilation of the charters and statutes which appeared in print in an adequate English version was that of 1579,[2] which is known as Rastall's Collection. It is the first one which contains the statutes previous to Henry the Seventh, 1485, translated into English. The production of this work and its successive revisions down to 1621 may well be regarded as marking an epoch in the history of the *lex scripta*. The statutes in this publication are arranged under apt titles, and the new statutes from time to time were added. "The translation contained in this collection appears to have been executed with superior care and industry."[3] It will be observed that only forty-two years intervened between the first and last editions of the English version of Rastall's work. In the very last part of that period the planting of Plymouth colony was effected.[4]

"By far the greatest portions of the written or statute laws of England," says Sir James Palgrave, "consist of the declaration, the reassertion, repetition, or the re-enactment of some older law or laws, either customary or written, with additions or modifications. The new building has been raised upon the old ground-work: the institutions of one age have always been modeled and formed from those of the preceding, and their lineal descent has never been interrupted or disturbed."[5]

[1]Pollock and Maitland, vol. 1, pp. 58-65.

[2]An edition of the charters and several of the statutes bearing date previous to Edward the Third, was published in book form in an English translation from the Latin in 1534. In this edition the laws were not arranged chronologically nor by title.

[3]Statutes of the Realm, vol. 1, p. xxii. See also reprints in this volume, *post*, constituting Appendix A, I, and Appendix A, II.

[4]The present generation is now separated from the period in which the Pilgrim Fathers were living by about two hundred years, and from their immigration by about two hundred and eighty years. Mary Allerton, the last survivor of the Mayflower immigrants, daughter of Isaac Allerton, and wife of Elder Thomas Cushman, died in 1699. Appleton's Encyc. of Biog., vol. 2, p. 43. Hon. Alfred Russell, in an essay in the Michigan *Presbyterian* for April 16, 1903, remarks that his eminent friend, Sidney Bartlett, of the Boston bar, recently deceased at a great age, in his youth, at his birthplace, Plymouth, Mass., conversed with those who in their youth had conversed with those who were Pilgrims on the Mayflower. Mr. Bartlett was born February 13, 1799, and died March 6, 1889.

[5]Sir James Palgrave, English Commonwealth, 1, 6.

COLONIAL BEGINNINGS IN NEW ENGLAND.

The situation of the New England colonies was, at the outset, in many respects anomalous. This was peculiarly the case regarding the laws by which they would be governed in the new country in which they had become established. As indicated in the historical outline already presented, the laws of England had assumed a status in which they could be obtained in books, and the text understood by the average man of affairs in the earliest colonial period. There were, however, important and, in some directions, impassible limitations on the applicability of the laws of England to the new conditions existing and constantly arising in New England. The reason underlying much of the statute law of the mother country did not exist in the American colonies. *Ratio legis cessat, cessat lex.* The ideas of the colonists with reference to the functions of the state and the rights of the individual were radically different from those entertained in the home government and reflected in the statute law of the realm as it stood in 1620. The wide divergence between the views of the New England immigrants and the representatives both of church and state, who were in control of affairs in England with reference to ecclesiastical concerns and the relations of church and state, were fundamental and irreconcilable. Necessarily, also, the principles and methods of ownership, occupancy, and control of lands, forests, and waters in the new country, which ancient systems and modern statutes had established in the mother country, were, in important features, inapplicable in the new country; and radical changes in systems of law relating to inheritances, ownership, occupation, and transfer of rights in real estate were inevitable.[1]

[1]Mr. G. T. Bispham, in an article entitled "Law in America, 1776-1876," North American Review, vol. 122, 1876, p. 156, says:

"On the other hand, a still more striking and interesting topic is the consideration of the departures of American law from English principles; and the cases here presented would be those in which, from circumstances which it ought to be the task of the student to discover and explain, American jurisprudence has found the rules of English law unsuited to the conditions of American life, has therefore repudiated or modified them, and has established a set of legal rules which may be termed essentially and properly American. This latter view of the general subject is one which would, with the greatest propriety, be considered the most interesting and instructive at this period of the national existence, when we are occupied in looking for, pointing out, and discussing those features in the different relations of life which are often grouped together under the somewhat vague term of American institutions. Both methods, however, of dealing with the general subject will have to be, to a certain extent, adopted; and in endeavoring to find out what are the peculiarities of American law which have grown up or sprung up since our separation from the mother country, and which tend to give our jurisprudence a national individuality, we shall be compelled to touch upon some points in which the American has advanced beyond, or fallen behind, English law in paths which are common to both.

"It is a trite remark, and one which has been made at many different times and with varying phraseology, that all law is the adaptation of principles of action to the physical and political conditions of a country, and to its

The Council for New England (Plymouth Company), as constituted in 1620, was made independent of the London Company, with which it had formerly been in co-operation. This Council for New England was empowered by its charter to legislate for the new colonies to be established under its auspices in America. It could exercise martial law and maintain a monopoly of trade within the limits of its patent. The Mayflower company, which effected its New England settlement in 1620, declared a purpose and asserted the right in the now famous compact of November 11, 1620, to "enact, constitute, and frame such just and equal laws, ordinances, acts, constitutions, and officers, from time to time, as shall be thought most meet and convenient for the general good of the colony; unto which we promise all due submission and

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moral, social, and intellectual growth. All national institutions must bear the impress of the outward features of nature by which the inhabitants are surrounded, and their modes of life, to a great extent, determined, and must also reflect the inward life of a nation and the external associations and internal consciousness by which that inward life has been moulded.

"If we were to imagine a man placed, in a savage state, in a new country, and were at liberty to suppose that his individual existence could be sufficiently prolonged to enable him to reach, in his own person, a condition of civilization and enlightenment, it would seem to be plain that the causes which control this development and determine its character must be sought for, in the first place, in the external physical phenomena by which he was surrounded."

See also Doe, C. J., in Thompson *v.* Androscoggin Co., 54 N. H., 548; Concord Mfg. Co. *v.* Robertson *et al.*, 66 N. H. Reports, pp. 1-30.

The Sources of New Hampshire Law by William Smith, 1, Proceedings of the New Hampshire Bar Association, p. 682.

Judge Parker (Lecture at Lowell Institute, 1869, cited below) also comments on the latitude for legislation which the local conditions in the new country necessarily afforded, and the not altogether obsolete question as to whether the laws of the mother country accompanied the exercise of her sovereignty in her American possessions in the early colonial period without special parliamentary legislation to that end. He says:

"But there was a restriction upon their legislation, religious as well as civil. They were to make no laws contrary to the laws of the realm; and the question arises, What was the character and what the extent of this restraint?

"We may safely conclude that the meaning of the provision is not that they are to make no laws different from the common law of England, for much of that law was entirely inapplicable to their condition, so that they were under the necessity of making different laws. Laws different from or contrary to the laws of feudal tenure could not come within the prohibition. The same may be said of laws relating to the peerage, and divers other matters of more common concern.

"So we may be assured that it was not a prohibition to make laws different from the statutes of England, for it was known that it was to escape from some of those laws that they emigrated. If they could make no law which provided for a different form of worship than that which was established in England,—if they must establish that with all its concomitants, they would hardly have crossed the Atlantic for the privilege of voluntarily subjugating themselves by their own acts, to the pains and penalties, and violation of conscience, to which the acts of others would have subjected them if they had remained. Moreover, they had no bishops,—could not consecrate any,—and no one proposed to do that for them when the charter was granted. Laud would doubtless have been pleased to do them that favor three or four years afterwards; but their right of legislation, or the restraints upon it, or the removal of restraints, did not depend upon that.

obedience." The territorial patent from the Council for New England to Plymouth Colony in America was issued in 1621.[1] The colony charter was not obtained until January, 1630. This later grant was from the Council for New England. It purported to invest the Colony of Plymouth in New England with the law-making power. On this point the following terms are employed:

"Alsoe it shall be lawfull and free for the said William Bradford his associats his heires and assignes att all tymes hereafter to incorporate by some usuall or fitt name and title, him or themselves or the people there inhabitinge under him or them with liberty to them and their successors from tyme to tyme to frame, and make orders ordinances and constituc'ons as well for the better governmente of their affairs here and the receavinge or admittange any to his or their society, as alsoe for the better governm't of his or their people and affaires in New Englande or of his and their people att sea in goeing thither, or returninge from thence, and the same to putt in execuc'on or cause to be putt in execuc'on by such officers and ministers as he and they shall authorise and depute: Provided that the said lawes and orders be not repugnante to the lawes of Englande, or the frame of governmente by the said presidente and councell hereafter to be established."[2]

"The true construction of the clause is that they shall make no laws contrary to,—antagonistic to,—in contravention of, the laws of the realm which extended or should extend over them, as inhabitants of the colony, and which were to be their paramount law.

"We are thus brought to the question whether any and what laws of the realm were in force in the colony at the time of the charter and emigration. Happily we can settle this question by authority. It is agreed that the law of the conqueror does not extend over the conquered country until the conqueror pleases to put it in force there. And although we now hold that the title of the crown to the greater portion of this country was by right of discovery, it was held by the courts of England, long subsequent to the reign of Charles I, to be a title by conquest. Chief Justice Holt, in the Court of King's Bench, in the 4th of Anne, said: 'The laws of England do not extend to Virginia, being a conquered country, their law is what the King pleases.'* And Blackstone, lecturing as late as 1756, says, 'Our American plantations are principally of this latter sort [conquered or ceded countries], being obtained in the last century, either by right of conquest, and driving out the natives (with what natural justice I shall not at present inquire), or by treaties. And, therefore, the common law of England, as such, has no allowance or authority there.' He adds that they are 'not bound by any acts of Parliament, unless particularly named.' "† Lowell Inst. Lecture, pamphlet ed., p. 31.

*Salkeld's Reports, vol. i, [ii] p. 666.

†Blackstone's Com., vol. i, p. 108.

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[1]Bradford, Bradford History, p. 167.

[2]Plymouth Colony Laws, ed. 1836, pp. 24, 25. The grant of a law-making power which appears in the charter of 1630 was foreshadowed in the patent of 1621 to Peirce and others. Baylies, Memoir of Plymouth Colony, vol. 1, part 1, pp. 185 *et seq.*, edition of 1866, edited by Samuel G. Drake. This history was first published in 1830, before the recovery of the Bradford manuscript, but is an excellent authority; full text of the patent of 1621, with

Without pausing here to consider the mooted question whether the Council for New England was vested with authority by its own charter to endow one of its colonial creations with the law-making power,[1] it is sufficient to remark that the charter of Plymouth Colony of 1629-30 did contain an apparent delegation of such powers. The practical construction of the grant, by the colonists, was in favor of the validity of this particular concession.[2] Perhaps it cannot be said, however, that these colonists did not exercise the law-making power, in the ordinary sense of the term, prior to the charter of 1629 [O. S.]. Mr. Brigham remarks, in his preface to the Plymouth Colony Laws, first published by the commonwealth under his supervision in 1836, that "The first revision of the laws was in 1636, and this may be regarded the first important era in their history, or perhaps, with more propriety, the origin of the legislation of the colony. Previous to this period there had been but few laws made and still fewer committed to record."

The code of 1636 was the work of the court, aided by eight deputies chosen for this special purpose. But later, in 1636, the functions of the general court were divided. For legislation the whole body of freemen were to attend, but proxies were allowed for the election of governor and assistants. In 1638 the representative system was fully introduced, although the general court formally reserved the right of revising or repealing the acts of the deputies.[3] Previous to this, 1635, the Council for New England had been dissolved. The members of the company had proved themselves totally unable to appreciate the extent of the enterprise in which they were engaged, and, furthermore, the surrender of a charter that was proving such a source of strength to the Puritans was undoubtedly most acceptable to Charles the First.

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introduction by Charles Deane, Mass. Hist. Soc. Coll., 4th Series, vol. 2, pp. 156-163.

The text of the patent of 1621, so far as it relates to the law-making power, is as follows:

"And shall also at any tyme within the said term of Seaven Yeers upon request unto the said President and Counsell made, graunt unto them the said John Peirce . . . Letters & Graunt of Incorporac'on by some usuall & fitt name & tytle with Liberty to them and their successors from tyme to make orders Lawes Ordynaunce & Constituc'ons for the rule governement ordering & dyrecting of all ꝑsons to be transported & settled upon the land . . . And in the meane tyme untill such graunt made, Yt shall be lawfull for the said John Peirce . . . by the consent of the greater ꝑt of them To establish such Lawes & ordynaunce as are for their better governm't and the same by such Officer or Officers as they shall by most voyces elect & choose to put in execuc'on. Mass. His. Soc. Col., Fourth Series, vol. 2, p. 161.

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[1]Quint, Historical Memoranda of Ancient Dover, p. 423.

[2]Mr. Brigham's Text, Plymouth Colony Laws.

[3]Doyle, English Colonies in America, vol. 2, pp. 71, 72.

On the 19th of March, 1627-8, a grant of land was obtained from the Council for New England by John Endicott and five other gentlemen, extending from three miles south of the river Charles to three miles north of the Merrimack, and westward to the Pacific ocean.

Mr. Doyle, the author of "English Colonies in America," vol. 2, pp. 88, 90, commenting on the events transpiring at this time, says:

"Of the six grantees, two only, Humphrey and Endicott, play any part in later New England history. The former had already been treasurer of the fishing company at Cape Ann, and he subsequently held office under the Massachusetts company both in England and in the colony itself.[1] John Endicott at once took a prominent place in the new undertaking, and to the end of his life he stood in the foremost ranks of New England statesmen, figuring in every stage as the embodiment of all that was narrowest and sternest in Puritanism.

"For the present this grant did no more than establish a private partnership. The partners might entertain and acknowledge among themselves political designs, but in the eyes of the world there was nothing to distinguish their scheme from those of Gorges or Mason.

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"Meanwhile the partners in England were taking steps to strengthen their legal position. The six original patentees admitted more persons into their partnership. This change was accompanied by one still more serious. The promoters of the colony were no longer content to be a mere private company for trade. The authority of the crown was to be called in to make good any flaw which might exist in their territorial title. In March, 1629-30, a royal charter was obtained, constituting a legal corporation, under the title of the Governor and Company of the Massachusetts Bay in New England.[2]

"This corporation was to elect annually a governor, a deputy governor, and eighteen assistants, who were to hold monthly meetings.

"The appointment of eighteen assistants shows that the company was to be enlarged considerably beyond its present numbers. General meetings were to be held four times a year. The members had power to elect necessary officers, and to defend their own territory by force against invasion or attack. The governor and assistants might, if they thought fit, administer the oaths of allegiance and supremacy to members of the company. It is not unlikely that this clause may have been inserted to meet the difficulty which had lately arisen in the case of Lord Baltimore, owing to the absence of any such provision in the Virginia charter.[3]

[1]Mr. Haven in Arch. Am., vol. 3, p. 50.

[2]The charter is in the Colonial Papers. It is also given in Hazard's Collection, vol. 1, p. 239; Poore, Charters and Const., 2d ed., pt. 1, p. 932.

[3]Doyle, English Colonies in America, vol. 1, Virginia, etc., p. 277.

"In anticipation of a future want the grantees resisted the insertion of any condition which should fix the government of the company in England. Winthrop explicitly states that the advisers of the crown had originally imposed such a condition, but that the patentees succeeded, not without difficulty, in freeing themselves from it.[1] That fact is a full answer to those who held that in transferring the government to America the patentees broke faith with the crown."[2]

The charter of 1629-30 provided also for the admission of new freemen by a majority vote of the company, for the annual election of officers by the whole body of freemen, and for four great and general courts each year, to be held by the governor or deputy-governor and seven or more of the assistants for the time being.[3]

The great and general court was granted the right "to make laws and ordinances for the good and welfare of the said company, and for the government and ordering of the said lands and plantation, and the people inhabiting and to inhabit the same, as to them from time to time shall be thought meet, so as such laws and ordinances be not contrary or repugnant to the laws and statutes of this our Realm of England."[4]

For a time the powers of the great and general court were allowed to lie dormant. At the first session, October 19, 1630, it was ordered "by the general vote of the people and the erection of hands" that the governor and deputy-governor, with the assistants, "should have the power of making laws and choosing officers to execute the same." It was further decided in May, 1631, that the assistants need not be chosen afresh each year. But by 1634 the freemen, aroused perhaps by the protests of inhabitants of Watertown against taxation without representation, had come to feel that they ought to participate in some effectual way in the making of all the laws; and at the meeting of the general court May 13, 1634, there were present, besides the governor, deputy-governor, and six other assistants, twenty-four deputies, three from each of the eight towns of the colony.[5] This first representative assembly voted that the deputies should

[1]This is stated by Winthrop in a pamphlet written in 1644, and published in an appendix to his life, vol. 2, p. 443.

[2]The most noteworthy upholder of this view is the late Mr. Oliver, in that remarkable book, The Puritan Commonwealth, published in 1856. Mr. Oliver was a Boston lawyer and a zealous churchman. Provoked by the extravagant and unreasonable praise so often bestowed on the founders of Massachusetts, he has subjected their actions to a merciless scrutiny, always acute, and sometimes just, but more often carried out in the spirit of a party advocate. His work is of no small value to the student of New England history as the pleading of an *advocatus diaboli*, and as a counter against the too frequent adulations of American writers.

[3]Poore, Charters and Constitutions, 2d ed., part 2, pp. 932-942.

[4]Poore, Charters and Constitutions, 2d ed., part 1, p. 937.

[5]See Winthrop's History of New England, ed. by Savage, vol. 1, pp. 152, 153, and note; Hutchinson, History of Massachusetts, 3d ed., vol. 1, pp. 39, 40.

have all legislative powers of the freemen, "the matter of election of magistrates and other officers only excepted, wherein every freeman is to give his own voice." From this time the records of the general court show that this body of deputies exercised its powers vigorously and extensively. At first the deputies were elected for each general court; from 1639 to 1640 they were elected semi-annually, and after 1642 annually. The deputies did not sit as a separate house until 1644, when they were formed into a second chamber as a direct result of the trouble over the Widow Sherman's pig.[1]

As early as 1634 settlers from Plymouth established a military post on the Connecticut as an outpost against the Dutch. Soon after, disaffected inhabitants of Massachusetts Bay formed settlements at Windsor, Hartford, and Wethersfield. The freemen of these towns, assembled at Hartford on the 14th of January, 1639, adopted a written constitution. It is worthy of note that this document contains none of the conventional references to a "dread sovereign" or a "gracious king," nor the slightest allusion to the British or any other government outside of Connecticut itself, nor does it prescribe any condition of church membership for the right of suffrage. It is regarded by writers of excellent authority as the first written constitution by which a government was created that is known to history.[2] Although Massachusetts Bay had previously governed these Connecticut towns by a commission appointed for that purpose, she now at least tacitly recognized their right to an independent government.

Up to 1640 the settlers of Providence seem to have lived under little or no government. In 1638 there was an attempt to establish a sort of church organization. In 1640, trouble having arisen with the inhabitants of Patuxet, something in the nature of a constitution was formulated; four arbitrators were appointed to settle differences existing in the colony; and provision was made for five selectmen, to be chosen by the whole body of freemen, to dispose of the lands, to conduct public affairs, and to admit new members.[3] It is not clear just how this form of government worked; but certain it is that Providence was generally considered, from the Puritan point of view, a "hotbed of anarchy," and in 1644 was refused admission to the New England confederacy for the alleged reason that it had no organized government.

The province of Maine had been granted to Gorges and Mason as a part of the grant of 1622, and also as a part of the

[1] See valuable introductions to Whitmore's Colonial Laws of Mass., ed. 1889; Fiske, Beginnings of New England, pp. 105-108; Savage's Winthrop's Hist. of New England, p. 193.

[2] Fiske, Beginnings of New England, p. 127. Similar claims are asserted in behalf of the New Hampshire constitution of 1776. Consider also in this connection the relations of the several earlier colonial charters as instrumentalities in the establishment of governments.

[3] Doyle, Eng. Col. in Am., vol. 2, pp. 180-184.

Laconia patent of 1629. It had been mutually understood that Mason was to hold the land west of the Pascataqua river, and Gorges the territory lying east of that river. At the dissolution of the Council for New England in 1635, and the resulting division of the territory, this previous understanding between Mason and Gorges was confirmed. There had been a few scattered fishing settlements along the Maine coast since 1623, but little or no attempt at an organized government. This province was confirmed to Gorges by a charter from Charles the First in 1639, by which he was given absolute right to establish such government for the province as seemed best to him.[1] In 1640 Gorges attempted to erect a government which appears to have been somewhat of the nature of a palatinate. It was the development of theories based on Old World models, exceedingly complex, and in no practical sense adapted to or workable in the conditions existing in a state, such as the district or province of Maine was at the time, or was destined to be in its future progress. Previous to the time of the union of the New Hampshire towns with Massachusetts Bay in 1641 there was no form of government in practical operation in the province of Maine except the orders emanating from the proprietors in general administration, and such local municipal governments as the necessities of the situation had compelled in the towns of Kittery, York, and a few other trading and fishing settlements.[2]

NEW HAMPSHIRE IN THE FIRST PERIOD, 1623-1641, AND THE DEVELOPMENT OF LOCAL SELF-GOVERNMENT IN THE FOUR TOWNS.

The essential differences existing between the towns of New Hampshire and the towns of Maine on the one hand, and those of Plymouth Colony and Massachusetts Bay on the other, arose from the presence and prominence of landed proprietors, actively seeking to control the planting of settlements and the constitution of governments for them in the territory north of the Merrimack, and the absence of such interference and such superior personal proprietorship in the two Massachusetts colonies. In the latter "the court," described in the charters, very shortly became a legislature; the magistrates or assistants became a branch of the legislature; while the house of deputies was an evolution in or an engraftment upon the system which, so far as the terms of the instruments indicate the intention of the English Company of Plymouth, was possibly never contemplated by the grantor. The fact that the towns of Maine and New Hampshire did not federalize themselves, and did not attempt the constitution of legislative bodies such as were

[1]Poore, Charters and Constitutions, 2d ed., part 1, pp. 774-783.

[2]Doyle, Eng. Col. in Am., vol. 2, pp. 216-218; Palfrey, History of New England, vol. 1, pp. 524-528.

evolved in the other New England colonies, was doubtless attributable to the obstacles that existed in the proprietorship of Mason and Gorges. Furthermore, there was among the early inhabitants of Portsmouth and Dover no such motive for strenuous exercise and advancement of the theories of self-government as were prevalent in the Plymouth and Bay colonies. The Pascataqua plants were business ventures. They were under the immediate direction of factors or superintendents commissioned by the territorial proprietor. In the first years of the history of Portsmouth and Dover the municipal law must be sought in the patents under which the proprietors had title and exercised dominion—in the few extant written records of the proceedings of the merchant adventurers,—and in the necessity for some enforceable rules of conduct, presumably devised with normal reference to the contemporary statutes of the realm of England and the common law of the mother country, and with adaptation to the physical, social, and industrial conditions of the locality.[1] At this time the term "New Hampshire" was unknown, and was not applied to this domain until the grant of November 7, 1629. The grant of Mariana[2] to John Mason of March 9, 1621, in respect to the description of the territory to be included in it, is somewhat ambiguous; but the grant of the territory of Maine, of date August 10, 1622, contained descriptions sufficiently explicit for the conveyance of the lands lying "betwixt the rivers of Merrimack and Sagadahock,"[3] etc. Under a patent signed by the Council for New England on the 16th of November, 1622,[4] David Thomson was granted six thousand acres of land and one island in New England. There is nothing extant to show where in New England this grant of land and the island were located, but there is evidence of an earlier patent to David Thomson *et als* "for a pt of Piscattowa River in New England."[5] This would seem to indicate that he had had this particular section in mind. Thomson conveyed one fourth part of the island to three merchants of Plymouth,[6] and agreed to convey in fee simple the fourth part of the six thousand acres. Therefore, on the face of the papers, it was as representing himself and the three merchants, and not as

[1] 25 State Papers, 780, *et seq.*, monograph by Joel Parker on "The Origin, Organization, and Influence of the Towns of New England"; Dillon, Municipal Corporations, vol. 1, ch. 1, §§ 9, 10; 24 State Papers, editor's preface; The Origin of Municipal Incorporation in England and the U. S., by Amasa M. Eaton, Proceedings of the American Bar Association, 1902, pp. 292-372.

[2] Charles Levi Woodbury, Capt. John Mason's Patent of Mariana, in Capt. John Mason, pub. Prince Society, pp. 45-52.

[3] 29 State Papers, 23-28.

[4] 25 State Papers, 716.

[5] 25 State Papers, 720.

[6] *Id.*, 735-6. See article by Chas. Deane, "The Indenture of David Thompson," pp. 713-739.

the representative of John Mason or the Laconia company, as Belknap[1] has it, that David Thomson, a Scotchman, came to the banks of the Pascataqua in the spring of 1623, and there established a permanent settlement within the present bounds of New Hampshire.[2] He probably remained there until 1626, when he took possession of an island in Massachusetts Bay which was afterwards confirmed to his heirs by the general court.

What property or business connections Thomson had, if any, with Mason and Gorges does not certainly appear at this time, and it is not clear what the evidence was upon which Dr. Belknap relied in asserting that his relations were with these parties in his operations at Pascataqua. The grant to the Laconia company did not exist until after the death of Thomson. His removal from these premises in 1626, after three years' occupancy, and the subsequent occupation of them by Mason and his associates in the Laconia company, might, perhaps, suggest an inference that there was a conflict in which the title set up by Mason prevailed. It should be noted that Mr. Jenness remarks that "the Laconians hired the buildings which had been put up seven years before by David Thomson at the smaller mouth of the Piscataqua, and established there, under command of Capt. Walter Neale, a factory, or *entrepôt*, as a basis for their magnificent design upon the New York lakes."[3]

It is not pertinent to the purpose of this article to intervene in the controversy between those who, with Dr. Quint, would set the planting of the colony at Dover Neck, at a date about the same as that of Thomson at Odiorne's point, and those who, with Mr. Jenness, place the Dover settlement five years later, in 1628.[4]

On November 7, 1629, the Council for New England granted to John Mason a part of the same territory that had been included in the Mason and Gorges patent of August 10, 1622, namely, from the middle of the Merrimack river to the Pascataqua; and ten days later to Gorges and Mason, with such others as they should admit, under the name of the Province of Laconia, the land west and northwest of the New Hampshire grant, on the borders of the Iroquois lake (Lake Champlain).[5]

The Laconia company was formed immediately after the failure of the Canada company, with the object of gaining a part of the profitable trade with the Indians about the Iro-

[1]Belknap, Farmer's ed., p. 4.

[2]See Appendix, *post*, pp. 770-772.

[3]John S. Jenness, Notes on the First Planting of New Hampshire, 25 State Papers, 661-709.

[4]25 State Papers, 661-709; Quint, Historical Memoranda of Ancient Dover, pp. 16, *et seq.*; Tuttle, Hist. Papers, p. 178 and note; same, this volume, p. 773.

[5]29 State Papers, 28-38.

quois Lake, which was supposed to be near to or, indeed, to form the source of the Pascataqua river. Capt. Walter Neale was put in command of an expedition sent in quest of the Iroquois country, and in the bark Warwick landed at Pascataqua in June, 1630. But the venture was a failure. "The Laconia company simply established two or three trading posts on the river and at the Shoals, after the manner of the East India factories, and for a short time carried on the peltry traffic and the fisheries at a heavy loss, until, at the end of three years, in bankruptcy and disaster, the company dissolved and vanished away."[1]

On March 12, 1630, the Council for New England granted to Edward Hilton and his associates, who had previously laid the foundation for a successful settlement on Hilton's Point, a tract of land three miles wide, south of the Pascataqua and up to the fall of the river. In November, 1631, they also granted to the Laconia company, which by its grant of 1629 received no land in New Hampshire, a tract of land lying both sides of the Pascataqua river, but at no point conflicting with the Hilton patent.[2]

Again, on the 22d of April, 1635, the Council for New England granted to John Mason New Hampshire and Masonia, together with all the rights, powers, etc., which they themselves possessed. This was Mason's share at the division of New England, apportioned a few weeks before the Plymouth Company surrendered its charter. In this grant was included the south half of the Isles of Shoals.

There is in the possession of the Maine Historical Society a copy of a royal charter bearing date of August 19, 1635,[3] which confirms John Mason in the territory finally granted by the Council for New England April 22, 1635. By this charter he was accorded rights of government not unlike those granted in 1639 to Gorges for his province of Maine. The authenticity of this charter has been seriously questioned, as no record of it is known to exist in the British archives. As John Mason died in the following December, he may have been unable to give personal attention to the proper recording of his charter. Certainly there is nothing surprising or improbable in such a grant from Charles to a loyal subject like John Mason, who had spent many years in his service; who was a strong supporter of the Church of England, and consequently a thorn in the flesh of the Puritans of Massachusetts Bay.[4]

[1]Jenness, Isles of Shoals, p. 58.

[2]25 State Papers, 698-705; 29 State Papers, 39-43; Quint, Hist. Memoranda of Ancient Dover, p. 17.

[3]For a copy of this charter with critical comment, see Tuttle and Dean, Capt. John Mason (Prince Society), pp. 355-378; also 29 State Papers, 69-85.

[4]"The last winter Capt. Mason died. He was the chief mover in all attempts against us, and was to have sent the general governor, and for this end was

The validity of the like charter issued four years later to Ferdinando Gorges is not questioned. All the reasons that induced such a grant to Gorges would operate in favor of a similar one to Mason. The argument against its validity, that it may have been a forgery executed for use in the subsequent litigation in which the Mason heirs were engaged, would have very much greater weight if there were any evidence that it was ever put to such use. The copy comes from the proper custody, that is, the office of the secretary of the province, and bears the certification of Mr. Secretary Chamberlain, one of the earliest incumbents of that office. The dispersion and suppression of papers which belong to the chain of evidence in Mason's title were entirely possible when those papers were later in the custody of persons who undoubtedly removed and destroyed the leaves in the court records in which the judgments in favor of Mason were entered.[1]

A bit of contemporary evidence concerning local opinion as to the nature and extent of the governmental rights contained in the various patents granted by the Council for New England may be found in "A Relation Concerning the Estate of New England," assigned by Jenness to about the year 1636. After mentioning twenty different patents the writer continues:

"The above menconed Patents are not all of one kinde, for some are in the nature of Corporacons and have power to make Lawes, ffor the governinge of their plantacons, others are but onely assignmn'ts of soe much Land to bee planted and possessed w'thout power of governm't.

"Of the first sort are onely theis ffower, vizt:

"1. New Plymouth 2. Massachusetts 3. Pascataquack & 4. Pemaquid.

"The Civill governmn't of the Colonies remaine in the power of those who are Principall in the Patents of w'ch those w'ch have authoritie to establish lawes, doe Execute theire Jurisdiction & soe ffar as I could understand, as neere, as may bee accordinge to the lawes of England, And those whoe have not that legall power doe governe their servants and Tennants in a Civill way, soe ffar as they are able."[2]

providing ships; but the Lord, in mercy, taking him away, all the business fell on sleep." Winthrop, History of New England, Savage's ed., vol. 1, p. 223. A sequence to the death of John Mason, important in respect to the possibility of the accomplishment and maintenance of a union of the towns of New Hampshire with those of Massachusetts Bay, was the fact that the assertion of the Masonian title was kept in abeyance for many years, in the widowhood of Capt. Mason's daughter, and until the able and aggressive grandson, Robert Tufton Mason, attained age and position which enabled him to procure the severance of the New Hampshire towns from Massachusetts Bay, and to compass the erection of a new province largely for the conservation of his landed interests.

[1]Farmer's Belknap, pp. 149, 150, 157; 3 Prov. Papers, 297, 298, 299.

[2]17 State Papers, 491, 492. It is not clear who was the author of this "Relation." The powers of government in the Laconia patent seem as extensive

A question of great interest to the student of early New Hampshire history, and one which was of some importance in its bearing on the long litigation conducted by the various claimants for New Hampshire soil, is that relating to the authenticity of the Wheelwright deed, by which it is claimed that on the 17th of May, 1629, John Wheelwright purchased from Passaconaway and other Indian sagamores a large tract of land in the region of Pascataqua, and in the same territory which was soon after granted to John Mason by the Council for New England. Like all deeds from the Indians it encountered serious antipathy and prejudice as evidence in determining titles. Governor Andros declared that such deeds were no better than "the scratch of a bear's paw."[1] Mr. Charles H. Bell, in his work on John Wheelwright in the Prince Society publications, has a very careful review of the evidence bearing upon the question of the authenticity of this deed, together with its interesting history in its entirety.[2]

The records of the town of Portsmouth were subjected to a singular treatment in 1652. The local authorities, regarding the greater part of the recorded matter as obsolete or superfluous, caused some extracts which they supposed might be of use to be entered in a new book, and the old ones were either lost or destroyed.[3]

The Dover records now extant reach back to an earlier date. It is probable, however, that the earliest records of that town are also lost, as the oldest official account of any town meeting in Dover is found in a book entitled "No. 7 old Book of Records."[4]

The records of Exeter are in a more complete and satisfactory form. They extend back into the period prior to the union, with Massachusetts Bay, to which Exeter did not become a party until 1643.[5]

The early records of Hampton are very nearly contemporary with the existence of the town, including the minutes of a town meeting, probably the first that was holden, as early as October 31, 1639. Hampton, however, was regarded from the outset as a Massachusetts town, the act of incorporation

as those in the Pascataquack patent granted somewhat later. While the writer was right in saying that the patents were "not all of one Kinde" he was probably not familiar with the exact provisions relating to the powers of government contained in some of the patents. See also opinion of Mr. Justice W. S. Ladd, 57 N. H., p. 79.

[1]Farmer's Belknap, p. 119; see also Fiske, New France and New England, 1902, p. 238.

[2]Bell, John Wheelwright, Prince Society pub., pp. 79-142. For another view of this question see Winthrop's Hist. of N. E., Savage's edition, vol. 1, Appendix H, pp. 486-514; also 1 Province Papers, pp. 56-60, and index.

[3]Farmer's Belknap, p. 28.

[4]Quint, Ancient Dover, pp. 1, 31.

[5]Bell, History of Exeter, pp. 43, 435.

under which it was organized having been granted by the Bay colony.[1]

It will be discovered that the material for an accurate description of the rules and methods of local government which prevailed in the early Pascataqua settlements is very meager. Dr. Quint says: "Under Edward Hilton, from 1623 to 1631, there could have been no civil organization. Nor did Thomas Wiggin, who came in 1631, returned in 1632, and led hither a reinforcement in the autumn of 1633, bring with it any power of government. By some historians he has been absurdly styled 'Governor.' He was merely the agent of an English land and trading company. That company itself had no power of civil government. Capt. Wiggin had, indeed, the power to allot lands to settlers, and formal descriptions of some of these grants are extant, copied in the next decade. There is some reason to suppose that William Waldron may have made the original papers.

"In the autumn of 1637, the people formed a 'Combination' for government, and Rev. George Burdett was placed at the head. It has been ridiculously stated that he 'thrust out' Capt. Wiggin, a man who was never in. The statement is one of those perversions which a student of early New Hampshire history comes to expect as a matter of course. The simple fact was that, in the absence of government, the growing colony found it necessary to organize. An independent government continued till a union with Massachusetts, 9th Oct., 1641. But an intermediate 'Combination' had been made 22 Oct., 1640, whose records were in a volume extant in 1682, to which Gov. Cranfield and the historian Hubbard had access. Whether the volume was taken to England in the Masonian trials, or never emerged from the hiding place where the people concealed it in those suits, is a matter of sad conjecture.

"In connection with the above notice of errors, it may be well enough to allude to two or three others. One is that Thomas Roberts was never 'Governor' in Dover; he was President of its court—its court, doubtless, being but little more than a board of selectmen. More stupid was the absurdity that imposed upon Hubbard a belief that Edward Colcord was once 'Governor'; he was one of three men appointed to decide cases 20 shillings in value. Entirely inexcusable is the statement in some state publications, as in a Register now before us, that Dover was incorporated 22 Oct., 1641. Some blunderer took the month and day of the second Combination and prefixed them to the year of the union with Massachusetts and called the hybrid result the date of incorporation. Dover never was incorporated.

"Dover was independent until annexed to Massachusetts 9 Oct. 1641. At the next general court, that of May, 1642,

[1]Dow, History of Hampton, vol. 1, p. 15.

Savage says that William Walderne appeared from Dover and sat one day. The general court held sessions in spring and autumn of each year. Deputies were chosen sometimes for one session, sometimes for the year."[1]

The facts which throw light upon the local government of the settlements on the lower Pascataqua are very fully marshalled and clearly presented in recent publications which include The Indenture of David Thomson[2] by Charles Deane, Notes on the First Planting of New Hampshire,[3] by John S. Jenness, Life of John Mason,[4] by Tuttle and Dean, and Historical Papers, by Charles W. Tuttle, posthumously published.[5]

The early settlers of New Hampshire had among their number no Bradford nor Winthrop to write out their annals, and to give posterity an account of all the details, great and small, which related to the inauguration and progress of their enterprises.

The great majority of the first Englishmen who occupied New Hampshire soil may be characterized as industrious, enterprising, and unpretentious farmers, fishermen, and lumbermen, who crossed the ocean under commonplace inducements and employment from the proprietors of the land patent, to prosecute their ordinary vocations. It may be assumed, also, that they manifested little concern about the establishment of a state or a church, the conservation of religious freedom, the propagation of the gospel, or the conversion of the heathen. If properly classed as churchmen and royalists, they have left no evidence that they were of a class that were obtrusive or aggressive in respect to their religious or political ideas.[6]

Government in these settlements, later considerably increased in population, was necessarily to some extent influenced and controlled by the Laconia company and its representatives. The agencies of this company were manifesting their principal activity between the years 1630 and 1633.[7]

[1]Dr. A. H. Quint, Historical Memoranda of Ancient Dover, pp. 17, 18.

[2]25 State Papers, 711-739.

[3]25 State Papers, 661-709.

[4]Volume of the Prince Society publications.

[5]See also Adams' Annals of Portsmouth, Brewster's Rambles about Portsmouth, Albee's History of New Castle, Jenness' History of the Isles of Shoals, Dow's History of Hampton, Brown's History of Hampton Falls, Bell's History of Exeter, and Historical Memoranda of Ancient Dover, by Dr. Quint.

[6]Shirley, Early Jurisprudence of New Hamp., pp. 15, 16. John J. Bell, Address before N. H. Hist. Soc., Proceedings, vol. 2, pp. 182-197; Copp *v.* Henniker, 55 N. H., p. 186; Perkins *v.* Scott, 57 N. H., p. 65; Colonial Life in New Hampshire, J. H. Fassett, 1903; Doyle, English Colonies in America, vol. 2, The Settlements North of Massachusetts, pp. 201-219; Judicial History of New Hampshire before the Revolution, by Salma Hale, *Monthly Law Reporter*, October, 1855; same article reprint, 3 Grafton and Coös Bar Association Proceedings, 53.

[7]Jenness, The Isles of Shoals, pp. 58-69. The statement of Mr. Whiton on this point, History of New Hampshire, 1834, p. 152, is inaccurate.

The interests of John Mason continued dominant after the failure of the enterprises of the Laconia company until 1635. This was the period in which the so-called governorships of Wiggin at Dover and of Neale and Williams at Pascataqua intervened. The ordinary forms and methods of town government were then in prospect, and later to be made possible by the death of the proprietor and the immigration of enterprising and self-reliant people from the neighboring colonies, who had become acquainted not only with the machinery but with the advantages of local self-government in towns.[1]

Dr. Quint contends that, if Captain Wiggin had authority from the patentees in England to act as governor, these patentees had themselves no right of government. "Nor," he continues, "had the Bristol men whose right these patentees had purchased, any power of government; nor did Hilton and others, who had sold to the Bristol men their Dover and Squamscott patent, have any power of government; nor had the 'Council at Plymouth' in England, who in 1631 gave these patents to Hilton and his associates; neither had Capt. John Mason, whose grants covered the same territory, for, as the English courts say in 1677, 'as to Mr. Mason's right of government within the soil he claimed, their Lordships, and indeed his own counsel, agreed he had none; the great Council of Plymouth, under whom he claimed having no power to transfer government to any.' Whatever civil power, therefore, Capt. Wiggin possessed was a clear case of 'squatter sovereignty.' And what there was was of a very weak kind, never extending to anything very serious. Wiggin himself was aware how doubtful his authority was."[2]

The legal position thus stated was one on which the Puritans were well informed, and a contrary theory, as already shown, was actually worked out in the Plymouth and Massachusetts Bay colonies. Had Capt. John Mason been permitted to continue the prosecution of his enterprise for a few years longer, with sufficient financial resources, and with the active endorsement of the home government, the accomplishment of his idea of a palatinate might have been more promising than the students of the affairs of that period are now disposed to admit.

Before passing on in the narrative and without, at this point, entering further upon a discussion of the validity of Dr. Quint's position in its legal aspects, it may be remarked that a very elaborate and conclusive treatment of the right of the Massachusetts Bay Company and Colony to legislate for them-

[1]New Hampshire State Papers, vols. 27, 28, 29, original documents and editor's prefaces to same volumes, relating to various aspects of the Masonian title and Masonian controversy.

[2]Quint's Ancient Dover, p. 423. Opinion by Justice W. S. Ladd, in Perkins *v.* Scott, 57 N. H., particularly comments on p. 79.

selves may be consulted in a lecture by Joel Parker, formerly chief justice of New Hampshire, and later Royall professor of law in Harvard University, delivered at the Lowell Institute February 9, 1869, on the subject, "The First Charter and the Early Religious Legislation of Massachusetts." Of course the fact is not to be overlooked that the patent of the Plymouth Company to the colony of Massachusetts Bay was reinforced by the crown charter of 1628-9.

The next stage in the development of definite schemes of local self-government in these towns is observed, in the concrete, in the adoption of the town system of government which was then prevalent in New England. The paucity of town records for this period renders the results of investigation as to the powers assumed and the methods employed in these practically independent town governments imperfect and unsatisfactory. The Exeter records[1] afford glimpses of ordinances enacted by the people in town meeting, or promulgated by the magistrates. More important, however, are the "Combinations for local Government." There is evidence here of a distinct purpose on the part of each of the three towns of Portsmouth, Dover, and Exeter to adopt a basis for a permanent government upon the democratic method. This must certainly be regarded as in the nature of organic law. A more extended treatment of these instruments is to be found in the papers of Mr. Tuttle.[2]

The Compact for Union with Massachusetts Bay and the Rights and Privileges Conceded to the Towns of New Hampshire.

By 1641 all of the New Hampshire towns had made some provision for local self-government. It will be remembered that Hampton, from the first, had been claimed by Massachusetts Bay, and that colony continued to exercise jurisdiction over it. But the conditions and prospects of the other three towns were not encouraging. After the death of John Mason in 1635 they seem to have been forgotten by the home government, and political conditions and tendencies in England at the time did not promise these obscure colonists much hope for the future. Massachusetts Bay, from an early date, had claimed them as within her grant, and as more and more of the Bay Puritans secured, by purchase, shares in the Pascataqua and Hilton patents, her claim was regarded with favor by a party of some strength in all of the towns.[3]

[1] 1 Province Papers, 128-145; Bell's Exeter, pp. 433-447; Appendix B, this volume, pp. 738-743.

[2] Tuttle, Historical Papers; *id.*, Appendix C, this volume, pp. 744-747.

[3] 25 State Papers, 691, 692.

Despite the fact that the course of the towns in adopting the "Combinations" showed a creditable respect for law, it was found difficult to preserve order among the people. This is not surprising when we recall that such adventurers as Burdett, Larkham, and Underhill were among their chosen rulers. As the towns were a frontier region, exposed to the hostilities of the French and Indians, whose most active spirits were licentious clergymen exiled from Massachusetts Bay, it was a most natural course to seek a political union, under favorable terms, with the strong contiguous Puritan colony.[1]

In 1639 the inhabitants of Dover petitioned the general court of Massachusetts to receive them under her jurisdiction; but the proposed conditions of union were unsatisfactory. In June, 1641, the patentees of both the Hilton and Pascataqua patents transferred to Massachusetts all rights of jurisdiction and civil government which they themselves possessed, reserving to themselves the title to the larger part of the land; and in September following the towns of Portsmouth and Dover were formally annexed under an act securing all rights possessed by the citizens of the Bay colony. A copy of the concession of June, 1641, and of the act of union, September, 1641, follow:

1641.
2 June.

The 14th of the 4th Mo, 1641.

Whereas some lords, knights, gentlemen, & others did purchase of Mr. Edward Hilton & of some mrchants of Bristoll two pattents, the one called Wecohannet, or Hiltons Point, comonly called or knowne by the name of Dover, or Northam, the other pattent set forth by the name of the south part of the ryver of Pascataquack, begining at the sea side, or neare there abouts, & coming round the said land by the ryver unto the falls of Quamscot, as may more fully appear by the said grant: And whereas, also, the inhabitants residing at ꝑsent wthin the limits of both the said grants have of late & formerly complained of the want of some good governm't amongst them, & desired some help in this ꝑticular fro the jurisdiction of the Massachusetts Bay, whereby they may bee ruled & ordered according unto God, both in church and comon weale, and for the avoyding of such unsufferable disorders, whereby God hath bene much dishonored amongst them: Those gentlemen, whose names are here specified, George Wyllys, gent, Robt Saltonstall, gent, Willi: Whiting, Edward Holliock, Thomas Makepeace, partners in the said

[1]Mr. Jenness and Mr. Tuttle both give the subject of the first union special attention, and their works contain discussions of the Puritan purposes and methods in respect to this consummation in distinct contrast with the ordinary presentation of the subject from the Puritan point of view.

pattent, do, in the behalfe of the rest of the patentees, dispose of the land & jurisdiction of the ꝑmises as followeth, being willing to further such a good worke, have hearby for themselves, & in the name of the rest of the patentees, given up & set over all that power of jurisdiction, or governm't, of the said people dweling or abiding wthin the limits of both the said pattents, unto the govrnm't of the Massachusetts Bay, by them to bee ruled and ordered in all causes, criminall & civill, as inhabitants dweling wthin the limits of the Massachusets governm't, & to bee subject to pay in church and comon weale as the said inhabitants of the Massachusetts Bay do, & no other.

And the freemen of the said two pattents to enjoy the like liberties as other freemen do within the said Massachusetts governmt, & that there shall bee a court of justice kept wthin one of the 2 pattents, wch shall have the same powr that the Courts of Salem & Ipswich have; provided, alwayes, & it is hearby declared, that one of the said pattents, that is to say, that on the south side of the ryver of Pascataquack, & in the other pattent one third ꝑt of the land, wth all improved land in the said pattent, to the lords & gentlemen & other owners, shalbee & remaine unto them, their heirs & assignes forever, as their proper right, & as haveing true interest therein, saveing the interest of jurisdiction to the Massachusets.

And the said pattent of Wecohannett shalbee divided, as formerly is exprest, by indifferent men equally chosen on both sides, wherby the plantation may bee furthered, & all occasions of difference avoyded.

And this honored Court of the Massachusets doth hearby ꝑmise to be helpfull to the maintenance of the right of the said patentees, in both the said pattents, in all legall courses, in any part of their jurisdiction.

Subscribed by the forenamed gentlemen in the ꝑsence of the Generall Court assembled the day afore written.

[Mass. Records, vol. 1, p. 324.]

1641.

2 June.

Whereas the lords & gentellmen patentees of Dover & other tracts of land upon the ryver of Pascataque have passed a grant of the same to this Court, to bee forever annexed to this jurisdiction, wth reservation of some ꝑt of the said lands to their owne use, in regard to ꝑpriety, it is now ordered, that the ꝑsent Govrnor, assistet wth 2 or 3 of the other matrats, shall give comission to some meete ꝑsons to go to Pascataque, & give notice hearof to the inhabitants there, & take order for the establishing of government in the limits of the said patentees, & to receive into this jurisdic-

tion all other inhabitants upon the said river as may & shall desire to submit themselves thereunto.

[Mass. Records, vol. 1, p. 332.]

1641.
7 October.

Whereas it appeareth that by the extent of the line, (according to or patent,) that the ryver of Pascataquack is wthin the jurisdiction of the Massachusetts, & conference being had (at severall times) wth the said people, & some deputed by the Generall Court, for the setteling & establishing of order in the administration of justice there, it is now ordered, by the Genrall Court, houlden at Boston, the 9th day of the 8th mo, 1641, & wth the consent of the inhabitants of the said ryver, as followeth:—

Impr: That from hencefourth the said people inhabiting there are, & shalbee, accepted & reputed under the government of the Massachusets, as the rest of the inhabitants wthin the said jurisdiction are.

Also, that they shall have the same order, & way of administration of justice, & way of keeping Courts, as is established at Ipswich & Salem.

Also, they shalbee exempted fro all publique charges, other than those that shall arise for or from among themselves, or fro any occation or course that may be taken to ꝑcure their owne ꝑꝑ good or benefit.

Also, they shall enjoy all such lawful liberties of fishing, planting, felling timber, as formerly they have enjoyed in the said ryver. Mr Symon Bradstreete, Mr Israell Stoughton, Mr Samu: Symonds, Mr Willi: Tynge, Mr Francis Williams, & Mr Edward Hilton, or any four of them, whereof Mr Bradstreete or Mr Stoughton to bee one, these shall have the same power that the Quarter Courts at Salem & Ipswich have; also the inhabitants there are alowed to send two deputies from the whole ryver to the Court at Boston.

Also Mr Bradstreete, Mr Stoughton, & the rest of the comissioners shall have power at the Court at Pascataquack to appoint two or three to joyne wth Mr Williams & Mr Hilton, to governe the people, as the magistrates do heare, till the next Generall Court, or till the Court take further order.

It is further ordered, that untill o[u]r comissionrs shall arrive at Pascataquack, those men who already have authority by the late combination to governe the people there shall continue in the same authority & power, to bee determined at the comeing of the said comissioners, & not before.

[Mass. Records, vol. 1, pp. 342, 343.]

It will be seen from these records that most favorable terms were granted by the general court of Massachusetts;

but this body was induced to go further and make an exception in favor of the New Hampshire towns that must have been viewed with many misgivings by the strictest sect of the Puritans. In the acts of the general court for September 27, 1642, the following entry appears:

"It is ordered that all the ꝑsent inhabitants of Pascataq who formerly were free there shall have liberty of freemen in their several townes to manage all their towne affaires, & shall each towne send a deputy to the Gen'rall Court, though they be not at ꝑsent church members."[1]

And in this way New Hampshire contributed something to the advancement of civil and religious freedom towards that state of ample development which was attained under the later American constitutions.

In 1643 Exeter, upon a second petition to the general court, the first probably not disclosing the proper spirit of submission, was admitted under the same terms as the other towns, with the exception that this town was not to be allowed a deputy to the general court. "But this was no [unmitigated] hardship, as the inhabitants could ill afford the expense which would thereby fall upon them, and their apparent need of a representative in the legislature was small."[2]

At this time Newcastle, although an important settlement, was still a part of Portsmouth; and that part of the Isles of Shoals which had early become commercially important was within the boundaries of the province of Maine.[3]

The Nature and Extent of the Lawmaking Powers with Which the Company and Colony of Massachusetts Bay Was Invested.

Among the fundamental facts which underlie the history of the statute law of New Hampshire these will be recognized as indisputable; the beginning of an original system of statute law of local construction in Massachusetts Bay was definitely marked by the promulgation of the Body of Liberties in 1641; the union of Portsmouth and Dover (soon to be followed by the accession of Exeter) with the Bay Colony was very nearly contemporary with the appearance of the Body of Liberties as an experiment in written colonial law for the ruling and direction of the people of all the towns of the two united colonies; this union on the part of the New Hampshire towns was with the Puritan state of Massachusetts, and not with the Pilgrim colony of Plymouth; the system of statutes which was developed from the Body of Liberties, and

[1] Mass. Records, vol. 2, p. 29; see also Doyle, English Colonies in America, vol. 2, pp. 213, 214.

[2] Bell, History of Exeter, p. 46.

[3] Jenness, Isles of Shoals, pp. 105, *et seq.*

which had resulted in 1679 from thirty-eight years of legislation, was valid law as well for New Hampshire as for Massachusetts Bay; there was no requirement for the transmission of those statutes for revision by the home government, and no evidence has appeared that they were even specifically repealed by the king in council or by act of parliament; they represented, therefore, the will of the people whose representatives gave them enactment, more fully, fairly, and certainly than any subsequent colonial legislation which was subjected to the veto power of crown governors and the revision of the home government; the laws enacted in the period between 1641 and 1679 were necessarily the foundation of much of the positive law subsequently enacted or re-enacted, and the substance of a large part of the common or unwritten law which was recognized by the people and continued to be an efficient legal element in colonial jurisprudence, both in New Hampshire and Massachusetts, however difficult it may be at the present time exactly to identify and measure it. It is also a historical fact of primary importance in the consideration of the validity of the statute law of Massachusetts Bay, enacted in the first period, that the right of the colony to exercise the powers of legislation in the manner, for the purpose, and to the extent that such powers were exercised has been repeatedly but never successfully challenged.[1] The argument in support of the validity of the powers exercised by the colony of Massachusetts Bay in the period between the grant of the first charter and its abrogation has not been presented with more cogency and conclusiveness than that which characterizes the review of the question by Joel Parker in his lecture at the Lowell Institute, before cited, on "The First Charter and the Early Religious Legislation of Massachusetts." While the completeness and accuracy of Judge Parker's examination of the subject at once deter others from an attempt to bring new and original considerations to bear on the points at issue, and render such an essay on the lines which he pursued almost or quite superfluous, the employment of extracts from his monograph may serve to outline the direction of his reasoning, and to recall this eminent authority as the best modern repository of the Puritan defense of the early Puritan legislation.

"Whatever rights the charter purported to grant," says Judge Parker, "vested lawfully in the grantees.

"The title to unoccupied lands belonging to Great Britain, whether acquired by conquest or discovery, was vested in the crown. The right to grant corporate franchises was one of the prerogatives of the king. And the right to institute and to provide for the institution of colonial governments, whether by charter, proprietary grant, or commission, was likewise one

[1]Chalmers, Annals, 1780; Oliver, Puritan Commonwealth, 1856; Emancipation of Massachusetts, Brooks Adams, 1887.

of the prerogatives. Parliament had then nothing to do with the organization or government of colonies.

"The confirmation, therefore, in the charter, of the grant of the lands from the Council of Plymouth (which derived title from the grant of James I., and which could grant the lands, but could not grant nor assign powers of government), with a new grant, in form, of the same lands, gave to the grantees a title in socage; substantially a fee-simple, except that there was to be a rendition of one-fifth of the gold and silver ores. The grant of corporate powers, in the usual form of grants to private corporations, conferred upon them all the ordinary rights of a private corporation, under which they could dispose of their lands, and transact all business in which the company had a private interest. And the grant of any powers of colonial government, embraced in the charter, was valid and effective to the extent of the powers which were granted, whatever those powers might be; the whole, as against the corporation, being subject to forfeiture for sufficient cause.

"The grant and confirmation of the lands, and the grant of mere corporate powers for private purposes, were private rights, which vested in the grantees; and which the King could not divest, except upon some forfeiture regularly enforced. Upon such forfeiture, the corporation would be dissolved, and all of the lands belonging to it would revert, in the nature of an escheat. But this would not affect valid grants previously made by it.

"The grant of power to institute a colonial government, being a grant not for private but for public purposes, may have a different consideration. Whether by reason of its connection with the grant of the lands and of ordinary corporate powers, it partook so far of the nature of a private right that it could not be altered, modified, or revoked, except on forfeiture, enforced by process; or whether this part of the grant had such a public character that the powers of government were held subject to alteration and amendment, is hardly open to discussion. At the present day it is held that municipal corporations, being for public uses and purposes, have no vested private rights in the powers and privileges granted to them, but that they may be changed at the pleasure of the government. That principle seems to be equally applicable to a grant of colonial powers of government; and the better opinion would seem to be that it was within the legitimate prerogative of the king, at that day, to modify, and even to revoke, the powers of that character which had been granted by the crown, substituting others appropriate for the purpose.[1]

[1]If this distinction between public and private corporations, well settled at the present time, was not then recognized, it is not because there has been a change of principle since the period; but because the principles which govern these two descriptions of corporate rights were not then well developed;

"If the king had assumed to revoke the powers of government granted by the charter, without substitution, or if he had imposed any other form of government, by which the essential features of that which was constituted under the charter would have been abrogated, it might have been an arbitrary exercise of power, justifying any revolutionary resistance which the colony could have made. But the crown, under the then existing laws of England, must have possessed legally such power over the colony as the legislature may exercise over municipal corporations at the present day. The charter, so far as the powers of government were concerned, could not be treated as a private contract.

"The charter was originally the only authority for the government of the territory embraced in it. The Council at Plymouth, in the County of Devon, never attempted to exercise powers of government over the colony of Massachusetts; and there was no compact or agreement to form a government. The grantees professed, in all they did, to act under the charter, and, as they contended, according to the charter.

"We are to look to the terms of the charter, therefore, and to a sound construction of its provisions, to ascertain what rights of legislation, religious or otherwise, were possessed by the grantees.

"The charter bears date March 4 1628 [29].

"From a careful examination of it, I have no hesitation in maintaining five propositions in relation to it.

1. "The charter is not, and was not, intended to be an act for the incorporation of a trading or merchants' company merely. But it was a grant which contemplated the settlement of a colony, with power in the incorporated company to govern that colony. * * *

2. "The charter authorized the establishment of the government of the colony within the limits of the territory to be governed, as was done by the vote to transfer the charter and government. * * *

3. "The charter gave ample powers of legislation and of government for the plantation, or colony, including power to legislate on religious subjects, in the manner in which the grantees and their associates claimed and exercised the legislative power. * * *

4. "The charter authorized the exclusion of all persons whom the grantees and their associates should see fit to exclude from settlement in the colony; and the exclusion of those already settled, by banishment as a punishment for offences. * * *

and hence the claim of the crown to power over both public and private rights, and the claims of the colonists under their charter, without any distinction between the two. When a right application is made of this principle to the colonial history, it will show that the complaints of the colonists of infringement of their charters were not all well founded.

"They were the owners of the soil; and, in the absence of conditions or limitations, the owner of such a title has an exclusive right of possession. They were the grantees of a charter of incorporation; and such grantees, unless there is some special provision or circumstance controlling them, may determine who shall be admitted to a participation in their corporate rights. * * *

5. "The charter authorized the creation and erection of courts of judicature to hear, try, and determine causes, and to render final judgments and cause execution to be done, without any appeal to the courts of England, or any supervisory power of such courts."[1] * * *

NEW HAMPSHIRE IN THE PERIOD OF UNION WITH THE MASSACHUSETTS BAY—THE SYSTEMS OF STATUTE LAW CONSTRUCTED AND DEVELOPED BETWEEN 1641 AND 1679.

An epoch has now been reached in which for thirty-eight years the statutes of Massachusetts Bay were those of New Hampshire. This may be regarded as the second period of the statutory, as well as political, history of New Hampshire. It was not New Hampshire alone, although a closer political relation was in every way desirable for the inhabitants of the Pascataqua towns, that was benefited by the union with Massachusetts. This fact is disclosed in the willingness of the general court to admit to the right of suffrage inhabitants of the New Hampshire towns, otherwise qualified, who were not church members. During this period New Hampshire was favored with strong leaders who made themselves felt in the united government. Major Richard Waldron, who represented Dover from 1656 until the establishment of the province, was for seven years speaker of the house of deputies. John J. Bell, in an address before the New Hampshire Historical Society some years ago, says of the men of New Hampshire at this time: "As we look back . . . we cannot but be struck with the fact that their leaders would have been eminent in any community. . . . They not only have greatly modified the character of New England town governments, but have contributed no less than Massachusetts herself to make New England's fame and character."[2]

During this period there was no obstruction or discouragement of Puritan migration into these frontier towns where before, for the greater part, the people had been satisfied with thinking for themselves on questions of theology without manifesting any special disposition to exclude those of different ecclesiastical notions from their midst. In a few instances the magistrates of New Hampshire towns employed harsh measures towards the Quakers, such as were customary in

[1]Lowell Inst. lecture, pamphlet ed., pp. 8, 10, 11, 30, 39, 42. Peter Oliver's "Puritan Commonwealth," Reviewed by J. Wingate Thornton, 1857.

[2]Proceedings, N. H. His. Soc., vol. 2, p. 191.

the Puritan colony.[1] It will be borne in mind that the same laws were in force in the two colonies.

The first code of laws of Massachusetts Bay was adopted in 1641, at about the time of the union with Portsmouth and Dover. It is probable that the governor and council had previously exercised a considerable degree of latitude in declaring and enforcing rules of conduct; and when, in 1635, the deputies took an active part in the government they were anxious for a definite code. "But," says Palfrey, "it was several years before this object, diligently pursued by the freemen, was accomplished. The magistrates and ministers, who did not favor it, knew how to interpose embarrassments and delays."[2] Two reasons which influenced the magistrates and some of the elders "not to be very forward in this matter" were, first, "such laws would be fittest for us which should arise *pro re nata* upon occasions"; and, secondly, "to raise up laws by practice and custom had been no transgression" of the charter. At length the matter was referred to Rev. John Cotton and Rev. Nathaniel Ward,[3] each of whom prepared and presented a code. The one drafted by John Cotton was never accepted either by the freemen or by the general court; but, as it was published in London in 1641 under a false title and frequently reprinted, it has long enjoyed an undeserved reputation as the Massachusetts Body of Liberties of 1641.

The code drawn by the Rev. Nathaniel Ward, possibly amended by the towns or by the general court, was approved in 1641, and is the foundation of the legislation of Massachusetts. A manuscript copy of these laws was found by the late Francis C. Gray in the Athenæum library, and first published in 1843 in a volume of the Collections of the Massachusetts Historical Society.[4]

No code of laws can be final, and, of course, statutes were passed each year, until a general revision was found necessary. A new compilation was made with care, several years being spent upon the work, and put in print in 1649. This is known as the Revision of 1649, or the First Printed Book of Laws.[5] It was almost certainly a book of about fifty-six pages, containing the Body of Liberties of 1641, very nearly entire, and such other statutes passed before May, 1649, as were of a

[1]Dover Records, December 22, 1662. Ancient Superstitions as reflected in the Early New England Laws, address before the Grafton and Coös Bar Association by Erastus P. Jewell of Laconia, 1899, manuscript unpublished. Ferguson, Essays in American History, The Quakers in New England, 1894.

[2]Palfrey, His. of N. E., vol. 1, p. 442.

[3]Savage's Winthrop's History of New England, vol. 1, pp. 388, 389.

[4]Mass. Hist. Soc. Col., First Series, vol. 5. *Post*, Appendix D, pp. 748-771.

[5]The first printing press in New England was established at Cambridge in 1638, (N. S. 1639.)

permanent nature. It was issued in an edition of six hundred copies. It is a singular fact that not one copy of this book is now known to be in existence. A supplement appeared in 1650, referred to in the revision of 1660 as the Second Book of the Law; and very likely other supplements were issued between 1650 and 1660, the date of the next revision.[1] The committee, in preparing the revision of 1660, included some acts not previously passed by the general court; and presumably it also marks the limitation of many previous acts. On May 22, 1661, an act was passed providing for the annual printing of the session laws, as we now term them.

As early as 1664 a movement was under way for another revision, and at the May session, 1665, the Royal Commissioners presented twenty-six changes which they desired to have made in the "Book of the General Laws and Liberties of 1660." Their principal objects were to have substituted for all expressions recognizing the supremacy of the commonwealth an acknowledgment of the royal authority; to procure a recognition of the Church of England; and to remove the long-standing limitation of citizenship to church members. An examination of the revision of 1672 shows that only one or two points were conceded by the general court, and that the recognition of His Majesty's supremacy appears in one clause, while the superiority, or at least the sufficiency, of the local authority was asserted in a score. The right of strangers to become citizens was nominally conceded, but on conditions that furnisned the minimum of privilege to all but church members. This revision of 1672 was in no sense a new code, but was published because of the lack of law books. In it were included such changes as had been made from time to time.

Another attempt was made to revise the laws after 1672, and would doubtless have succeeded before the beginning of the presidency of Joseph Dudley in 1686, had not the magistrates and deputies failed to agree as to the part relating to the general court. The question was whether the charter provided for a negative in any branch of the general court, that is, whether it allowed a convention of the whole court, wherein all the magistrates might be of one opinion, and yet be overpowered by the numerical superiority of the deputies. In 1652 it had been voted that when the houses differed in any case of judication, whether civil or criminal, such case should be determined by the major part of the whole court. But this method of forcing an agreement was very disagreeable to the magistrates who, contending against it in 1672, reluctantly yielded the point at last, though their powers were thereby greatly curtailed. But in 1686 they were more persistent, and by a prolonged contest prevented the comple-

[1]The Charlemagne Tower Collection of Colonial Laws, pp. 62-64.

tion of a new edition of the laws, and this, too, even after a part of the type for the volume had been set.[1]

In the Plymouth Colony there were compilations of the laws in manuscript, made in 1636 and 1658. But in 1671 "a complete digest of all the laws then in force" was perfected. This was the first edition of the Plymouth Colony laws that was printed.[2] It is from this edition that the Cutt criminal code of New Hampshire was adapted almost verbatim.

The foundation of these early colonial laws was necessarily in a large measure in the Statutes of the Realm, which, as already shown, had grown into a system comprehending a great variety of subjects and exigencies for which statutory provisions had been required and enacted.

The charters, also, should be kept in view by those who investigate the beginnings and progress of law-making in the colonies. While the limitations upon legislation imposed by the charters were sometimes ignored or circumvented, it would be unsafe to assume that they were not regarded and followed, with reference to most of the purposes and objects of legislation, as the organic law.

It is also necessary in any attempt to identify the sources of the law by which the people of the Puritan colonies were governed, either under positive statutes, current decisions of their own courts, or unrecorded usages, to take into account the fact that they recognized the word of God, as declared in the Holy Scriptures, as a guide, as an authority, as a law in temporal as well as spiritual affairs. This is certainly true of the earlier Pilgrim and Puritan immigrants in Plymouth Colony and Massachusetts Bay. The Body of Liberties of the Massachusetts Bay colony and the General Laws of Plymouth Colony contain provisions and declarations which were undoubtedly intended to give the magistrates the right to have recourse to the Scriptures in the administration of the judicial department of the colonial governments. This is, perhaps, more specifically indicated in the Plymouth laws than in the Body of Liberties of 1641.[3] The relaxation of the strictness of Puritan ideas on this subject, which the history of the colonies discloses, is well marked in their successive revisions and compilations of laws.[4]

[1]For the history of the various editions of Mass. laws prior to 1686, see Whitmore, Colonial Laws of Mass., ed. 1889, pp. 1-28 and 71-117; supplement to author's notes in the 1890 edition of the same work.

[2]Plymouth Colony Laws, ed. 1836, pp. viii, ix.

[3]Body of Liberties, art. 1, p. 752, and art. 65, p. 759, *post*, Appendix to this volume; Plymouth Colony Laws, edited by William Brigham, 1836, pp. 241, 243, 244.

[4]From a New Hampshire point of view Dr. Belknap reviews the first union with Massachusetts in chapters 4, 5, and 6 of his history. In his chapter 3 he discusses the principles of New England Puritans. The Political Annals of the American Colonies, by George Chalmers, an Englishman and royal-

Surrounded, as these colonists were, by tribes of savages, upon whose continued friendship they could not rely for any considerable length of time, and with colonization progressing along the St. Lawrence by people of a nation which was the hereditary enemy of the mother country, a military spirit and military habit were developed in New England which characterized the people in successive generations, and which was reflected in their laws.[1]

The revolution in England which resulted in the Commonwealth and Protectorate, 1649-1660, afforded the colonists a respite from the autocratic policy of the Stuarts. It was an opportunity which was much more advantageous to them at this particular stage of the development and application of their ideas of self-government than any similar period of non-interference could have been after they had become intrenched in their political positions, and had secured the advantage of largely increased population and resources, as well as a military power and prestige not to be despised.

The inauguration and maintenance of a New England confederacy, which began in 1643 and continued for more than a generation, was a source of strength and political education, and an augury of future governmental possibilities which has large meaning in the constitutional history of the people of these colonies.[2]

In 1679, upon this foreground of colonial history, events, elsewhere reviewed in these pages, culminated in the dis-

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ist, published in 1780, appeared about the same time as the first edition of the work of Dr. Belknap. The comments of the latter on certain portions of the Annals are contained in the preface to Farmer's edition of Belknap, p. ix. Prominent among the critics of the New England Puritans are Mr. Oliver in his Puritan Commonwealth, 1856, elsewhere mentioned, and Brooks Adams in his Emancipation of Massachusetts, 1887. Mr. Jenness and Mr. Tuttle, whose works are frequently cited in this volume, may be regarded as, in a sense, the principal representatives of the anti-Puritan school of historians, who have treated the subject in modern times with particular reference to the relations of colonial New Hampshire to the dominant Puritan element in the early New England governments.

[1]Potter, Military History of N. H., part 1; the Editor's Historical and Bibliographical Notes on the Mil. His. of N. H. in The History of the Seventeenth Regiment, ch. 28; *id.*, pamphlet; Penhallow, Hist. of Indian Wars in New England, in N. H. His. Soc. Col., vol. 1, pp. 14-133; Mather, Relations of Troubles Which Have Happened in New England Because of Indians, 1614-1675; Farmer's Belknap's Hist. of New Hamp., chaps. 5, 10, 12, 14, 19, 20, and 22; Pike's Journal, 3 Collectons of N. H. Historical Society, 40; Parkman's histories, especially Pioneers of New France, Frontenac and New France under Louis XIV, Half Century of Conflict, and Montcalm and Wolfe; Fiske, New France and New England, 1902; History of the Indian Wars in New England to 1677, by William Hubbard, ed. by Rev. Samuel G. Drake, 1865.

[2]Doyle, The Eng. Col. in Am., vol. 3, pp. 229-237; Palfrey, Hist. of New England, vol. 2, chaps. 1, 2, 6, and see list of commissioners, vol. 2, pp. 635, 636, and vol. 3, 599-601; Fiske, Beginnings of New England, pp. 153-198; Plans for the Union of the British Colonies of North America, 1643-1776, by Frederick D. Stone, published in Carson's History of the Celebration of Hundredth Anniversary of the Promulgation of the Constitution of the U. S., vol. 2, pp. 439-503.

association of the New Hampshire towns from the Massachusetts Bay colony, and their establishment as a royal province. The causes which led to this result have been analyzed by the historians of New Hampshire and New England, and are clearly defined in these authorities. The beginnings of New Hampshire as a separate province were accompanied by grants of powers of legislation, and a full investiture with the responsibilities of a separate government, subject to the regulative and restrictive control of the mother country.[1]

THE TRANSITION PERIOD.

The royal edict in 1679, separating the New Hampshire towns from the union with Massachusetts, which had continued thirty-eight years, marked the beginning of the end of an era. The New England commonwealths, which had been developed at this time to such proportions and on such lines of political progress as the student of colonial history observes at this period, were attracting the jealous attention of the Stuart ministries on account of their manifest tendencies towards independence. In respect to their municipal rights and privileges they were so strongly intrenched in the New England town system that they were there practicably impregnable. There was not the same security, however, for the federalized governments which had been developed on the basis of charters granted by the crown, or crown corporations created for the purpose of colonizing America.

Various causes had been in operation to convince the home government of the necessity for radical measures to counteract or control that policy of home rule which was manifest in the Puritan colonies, and which presaged such an ultimate assertion of colonial rights as might be destructive of the sovereignty of the mother country.

As the erection of a province government for New Hampshire in 1679 marks the beginning of a transition period, so the grant of a new charter to Massachusetts Bay and Plymouth Colony, united as Massachusetts in 1691, and the restoration of a province government to New Hampshire, one of the same group of events, deliminate the later boundary of this period. The establishment of the province of New Hampshire in 1679, the abrogation of the charter of Massachusetts Bay in 1684, the abolition of colonial assemblies in five New England colonies, and the temporary establishment of the Dominion of New England in the three years of 1686-7, 1687-8, and 1688-9 are the most conspicuous milestones in the

[1]This epoch in New Hampshire has been treated, among others, by Mr. Doyle and Mr. Tuttle, and their chapters on the causes which operated in the establishment of a separate province government are given in full in this volume, Appendix E, pp. 770-785.

final progress of the autocratic policy of the Stuart governments towards the New England colonies to an extreme that could be reached but not maintained.

With the abdication of James the Second in 1688 the preposterous governmental scheme that had been erected for the people of New England, and against the protests of the great majority of them, collapsed at once upon the removal of the exterior supports upon which its existence depended.

There was in these years a strong and determined party in New Hampshire acting in opposition to Robert Tufton Mason, and his royalist and anti-Puritan adherents. Mason was the able, resourceful, and indefatigable successor in the legal control and active management of the property and rights of the first proprietor.

In Massachusetts a similar party had maintained a steady opposition to the local loyalist leaders, among whom Edward Randolph was the most consistent, the most active, and the most dangerous.[1]

Mr. Doyle has pointedly characterized the policy of separating the New Hampshire towns from Massachusetts, and reorganizing them into a feeble province on the most exposed frontier of New England. "The settlers were exasperated, and with justice, at their severance from Massachusetts. They may have had no special sympathy with that colony. But no position could be more wretched than that of a little, isolated, and independent settlement, in the middle of a line of frontier constantly threatened by savages. The very nature of the attack made matters worse. If the danger had been that of invasion and permanent occupation, then the interests of Massachusetts and New Hampshire would have been identical, and the weaker colony would have been sure of help. But the war which France was waging was not, as yet at least, a war of conquest. It was a war of partial and local destruction. The more efficient was the defense along the frontier of Massachusetts, the more certain was it that the tide of invasion would hurl itself against the one undefended district. We may well believe that the petition for a system of joint defense under a general governor came from those inhabitants of New Hampshire who were, from past association, hostile to Massachusetts, and yet felt the helplessness of their own colony, isolated under a proprietor."[2]

The project of reunion was thwarted by the interested efforts of Mr. Mason. His motives and purpose were personal. The efforts of Randolph, his coadjutor, though induced, perhaps, by different considerations, were directed to the same

[1] Tuttle's Historical Papers; Andros Papers, 3 vols., published by the Prince Society.

[2] Doyle, English Colonies in America, vol. 3, p. 329; *id.*, *post*, Appendix E, II, p. 780.

end. Both based their appeals to the crown upon the urgent necessity of curtailing the ominously increasing political power of Massachusetts Bay.

The Earl of Bellomont, in his correspondence with the Lords Commissioners of Trade and Plantations a few years later, thus describes the policy of Mason and the coterie that had purchased the Masonian title after the death of Robert Tufton Mason in 1688:

"And for a conclusion I humbly and earnestly recommend the vacating of Colonel Allen's pretension to New Hampshire, and all other claim derived from Mason which . . . are an abomination and a mystery of iniquity."[1]

The reaction from the extreme measures which took form and effect in the commission, instructions, and administration of Governor Andros failed to restore the New England colonies to the independent status to which they had attained prior to 1679. Massachusetts Bay, Plymouth, and Maine, united as Massachusetts by the new charter of 1691, regained the right of representation for the towns in the general court, a limited law-making power, and the autonomy of the towns as the primary units of government. But they were required to submit to the provision in the new charter for the appointment of a governor by the crown, instead of being suffered to elect their own chief magistrate according to the custom which had been previously established. Several other points in the readjustment of the relations of the home government with the government of the colonies were important and are familiar to those who have reviewed the course of events in this period. Not the least noteworthy of these provisions were the regulation of the right of appeal from the judgments of the colonial courts, and the explicit requirements relative to the transmission of colonial laws for review by the privy council.

The settlement of this new system of colonial administration, which was introduced in New Hampshire in 1679 and restored here in 1692, and in which Massachusetts finally acquiesced in 1691-92, was very nearly in point of time midway between the immigration of the Pilgrims in 1620 and the commencement of the War for Independence in 1775. An era in colonial affairs was concluded in 1692. Then a new book was opened in the account between Britain and her American plantations. The specifications on the part of New Hampshire to cover the first ten years of the last half of the colonial period are deducible from the records and collateral authorities which relate to the administration of government in the province under the commissions of Samuel Allen and

[1] 2 Province Papers, 355; *id.*, Palfrey, History of New England, vol. 4, p. 217.

the Earl of Bellomont. The final summary was drawn by Thomas Jefferson in 1776.[1]

In this province the enquiry as to whether William and Mary, their ministers and parliaments, had fairly met the obligations that were imposed upon them, as the responsible heads of a constitutional monarchy, in the then existing relations with their colonies, brings in issue the character and fitness of the royal governors and their deputies and lieutenants, the sufficiency of the measures employed and means provided for the protection and defense of these outposts of English enterprise and racial extension, the consideration that was accorded the province laws submitted for confirmation or rejection, the bestowal of the governorship upon Mr. Allen and Mr. Usher, under circumstances in which they stood as contestants with the people in respect to ownership of the principal part of the lands lying within the boundaries of the province, and the restriction of the trade of the province to the home market in England or to designated provinces under the provisions of the navigation acts.[2]

It is not difficult to trace serious causes of disaffection existing in the first years (1692-1702) of the restored province government, and persistent to the culmination of the aggregate of discontent in the revolution of 1775.

Colonial Supervision and Administration in the Home Government.

The entire management of colonial affairs until after the revolution of 1688 was in the control of the king and the privy council. As early as 1636,[3] however, there seems to have been a committee or board variously referred to as Commissioners of Plantations, Lords Commissioners of Plantations[4] or Committee for Foreign Plantations,[5] whose especial duty it was to give counsel in colonial matters. A special Commission for Plantations was appointed on November 24, 1643, by the Long Parliament[6]; and again under date of March 2, 1650, appears the following:

"Order of the Council of State. The whole Council, or any five of them to be appointed a Committee for Trade and Plantations."[7] Soon after the restoration, December 1, 1660,

[1] Poore, Charters and Constitutions, ed. 1878, part 1, pp. 3-5; Hill, Liberty Documents, 1901, pp. 183-187.

[2] A compilation of the acts of parliament which related to the government and affairs of the American colonies, with appropriate comments, is a desideratum in the literature of the jurisprudence of the colonial period.

[3] Calendar of State Papers, (Colonial), 1574-1674, § 176.

[4] *Id.*, § 193.

[5] *Id.*, § 338.

[6] Calendar of State Papers (Colonial), 1574-1660, p. 324.

[7] *Id.*, p. 335.

Charles the Second appointed a Council for Foreign Plantations, composed of thirty-five members from the privy council, the nobility, gentry, and merchants.[1] The duties of this council, like those of its predecessors, were only advisory; but they were instructed to inform themselves of the state of the plantations and their governments, to write to all the governors and patentees, requiring a report of their affairs, of the nature of the laws, number of men, fortifications, etc. "To adopt means for rendering those dominions and England mutually helpful. . . . To inquire into the government of the colonies of foreign states, and apply what is good and practicable to the English plantations. To call experienced merchants, planters, seamen, etc., to their assistance." It was also their duty to provide orthodox ministers for the plantations, and to consider how the natives and slaves might be made ready for baptism in the Christian faith.[2] "The proceedings of this commission are fully recorded, and reveal an astonishing activity in colonial questions, indicating the new place which these affairs occupied in English policy."[3]

Early in 1675[4] Charles the Second dissolved the Council of Trade and Plantations, doubtless another name for the Council for Foreign Plantations; and on March 12, 1675, all business relating to the colonies was committed to a committee of the privy council. Five members were to constitute a quorum. They were to hold weekly meetings and report from time to time to the king.[5] This committee exercised about the same authority as the Council of thirty-five had done; but in 1696, after the House of Commons had come to take a more prominent part in industrial and colonial questions, a Board of Trade was appointed to promote trade and to inspect and improve the plantations.[6] This board, after nearly a century, developed into the Colonial Department.[7]

THE CUTT CODE, 1680, 1681.

No better evidence exists of the inapplicability and inadequacy of the laws of England in their entirety, when employed without modification in practical experiments in gov-

[1]Calendar of State Papers (Colonial), 1661-1668, p. viii.

[2]*Id.*, 1574-1660, pp. 492, 493.

[3]Woodward, The Expansion of the British Empire, 1899, p. 138.

[4]Calendar of State Papers (Colonial), 1675-1676, § 429.

[5]*Id.*, §§ 460-464.

[6]Doyle, English Colonies in America, vol. 3, p. 323.

[7]In the notes which accompany the documents and acts contained in the principal text of this work, and in the Appendix, it is quite possible that the terms descriptive of these several boards, commissions, and committees may have been inaccurately applied as regards the time of one or more of those organizations. Such an occasional anachronism will hardly be misleading, as the date will indicate correctly the particular official body to which allusion is made.

ernment in the new world, than the unyielding insistence of the colonial legislatures in the exercise of the law-making power for their own constituencies. The president, council, and deputies, constituting the general assembly of the province of New Hampshire, immediately upon their assumption of office, addressed themselves to this task of providing the people of the province with a body of laws adapted to local necessities, and at length produced what is commonly known as the "Cutt Code." Its provisions were necessarily drawn with reference to the experience of the members of the general assembly in dealing with colonial conditions in the period that had intervened since the New Hampshire towns, fifty years previously, had built up local governments for themselves. Undoubtedly these legislators had in solicitous consideration, also, in devising and adapting the provisions of their laws, the Masonian claim and all the possibilities that were involved in its reassertion against the property and people of New Hampshire.

In the past the opinion seems to have been quite generally entertained that the body of laws known as the "Cutt Code" was taken in its entirety, or for the greater part, from the laws of Massachusetts Bay colony. Reference is made in notes which appear later in this volume (*post*, p. 10) to the statement of Mr. A. H. Hoyt in his "Notes, Historical and Bibliographical, on the Laws of New Hampshire," to the effect that that portion of the Cutt laws which relates to crimes is copied in substance from the laws of Plymouth Colony and not from those of Massachusetts Bay. This assertion is verified by a comparison of these two series of laws. The sources of the civil part of the "Cutt Code" are not so certainly ascertainable. Several sections were undoubtedly transcribed from the contemporaneously existing laws of Massachusetts Bay. Other articles are quite dissimilar from the corresponding ones in the Bay colony laws, while others still which appear in the "Cutt Code" are not found in the laws for that period of either Massachusetts or Plymouth.

It appears in the narrative of proceedings in the province of New Hampshire which was transmitted to the home government in 1681 (17 State Papers, 555-59, abstract, *post*, p. 786), that the writer made this assertion: "They [the assembly in the time of Cutt] have made a law to confirm the laws of Massachusetts colony and the title to lands derived from that authority."

The basis for this statement is doubtless to be found in the "Cutt Code," article [1], *post*, p. 23, and article [14], *post*, p. 28. It will be observed that the article relating to the confirmation of town grants, etc., had peculiar reference to New Hampshire affairs, and that it was well calculated to excite the most serious antagonism of the representatives of the

Masonian interests. A similar provision reappears in statutes enacted in the time of Partridge, chapter 19, pp. 693, 695, 696, *post;* notes relative to same acts, *post*, pp. 649, 650.

The provision for the continuance of the pre-existing laws, so far as they were necessary to provide for exigencies that might not have been contemplated in the enactments of the new code, was not an extraordinary or unusual act of colonial legislation. Orders issued in the time of the presidency of Joseph Dudley and of the governorship of Sir Edmund Andros, *post*, p. 249, are directed apparently to the same purpose.

Referring to this body of laws known as the "Cutt Code," Secretary Chamberlain, in a letter to Mr. Blathwayt of date May 14, 1681, remarks as follows: "The whole system in general being collected mostly out of the Massachusetts laws."

Although this statement is somewhat qualified, it is sufficiently broad to have been the possible origin of the opinion that was long current as to the origin of this particular series of New Hampshire laws. In the same communication Mr. Chamberlain continues: "Surely it could not well stand with the mind and pleasure of His Majesty that we here should cast off obedience to their [Massachusetts Bay's] jurisdiction and voluntarily submit to, and yoke ourselves so inseperably to their laws."

No further remarks need be made on the subject in this connection, except to call attention to the fact that the laws of these three colonies, which were in operation at the time when the first body of New Hampshire laws had been enacted, are now conveniently accessible; and the student of comparative jurisprudence who is desirous of pursuing the subject further will find the material ample for his investigations.[1]

The events that led up to the establishment of the province government, and the interests that were active in the accomplishment of this result, are prominent features of the historical setting in which the first province government and the first body of province laws are placed.[2]

The importance of this epoch in the statutory history of the province has rendered recourse to the contemporary authorities, and the more recent critical treatment of the subject, appropriate to the present work in connection with the presentation of this Code, and, indeed, indispensable.

The auxiliary articles which are found in the appendix, and the notes which accompany the principal text of the

[1]See General Laws and Liberties of Massachusetts, 1672, in Whitmore's Colonial Laws, ed. 1887; General Laws and Liberties of New Plymouth, 1671, in Brigham's Plymouth Colony Laws, 1836; Laws of Connecticut, Reprint of the Original Edition of 1673, with Prefatory Note, by G. Brinley, Hartford, privately printed, 1865; Cutt Code, this volume, *post*, pp. 9-47.

[2]Doyle, English Colonies in America, vol. 3, p. 294.

laws of the time of the Cutt and Waldron administration, will afford the reader immediate access to the approved authorities, or citation to them.[1]

The Cranfield Code and the Essays of the Lieutenant-Governor and His Council in Legislation without the Co-operation of the House of Representatives.

This period was brief, but replete in important events. It marks a striking transition from the conservative policy of the Cutt and Waldron administration to the offensive and arrogant misgovernment of Cranfield, Barefoote, and Mason. As regards the laws of the province it was apparently assumed to be incumbent on the general assembly to formulate and adopt a new code. Such a body of laws was speedily adopted by the two new houses of the assembly, and approved by the lieutenant-governor. It now transpires from an inspection of the contemporary correspondence of himself and his secretary with the home government that both of these officials were intriguing for the disallowance of these laws, to the enactment of which they had ostensibly given cordial approbation. Early in this administration the lieutenant-governor became pecuniarily interested (and it is not impossible that he was a partner from the beginning) in the Masonian claim, and a co-operating agent in its enforcement against the people over whom he was the appointed chief magistrate, and over whose interests he should have been a disinterested and impartial guardian. His attitude, however, soon became notorious. His cynical frankness left no room for doubt as to his relations with Mason. His assembly broke with him before the end of the first year, and refused to grant him any revenues or even to assemble for any purpose, either at his request or upon his command. His conduct disclosed no tact, no disinterested purpose, and no regard for the proprieties of his position. A selfish and mercenary spirit was the principal characteristic of his policy. The body of laws which was enacted in the first year of his administration is commonly known as the "Cranfield Code." Upon the refusal of the house of representatives to co-operate with him in legislation for any purpose (except in a single instance, upon the urgent initiative of the home government, when the passage of an act against pirates was secured) he construed his commission as giving himself and his council authority to legislate without the concurrence of a house of representatives. The events of this administration have proven unusually attractive to the historians of the colonial period, and their treatment of this part of it is voluminous and exhaustive. The acts of the time of Cranfield and his deputy, Walter

[1] Principal text of this volume, *post*, pp. 1-47; Appendix E, *post*, pp. 770-785.

Barefoote, are given in full in the text. An unusual number of duplicates, or different renditions, of the "Cranfield Code" have been preserved in manuscript through the industry of the lieutenant-governor and his secretary in making their contemporary transmissions, according to the requirements of the commission, to the home government. These have been presented in such manner as to identify each copy, as far as practicable, in point of time and in its proper relation to contemporary events. Other papers which serve to add to a correct understanding of this particular chapter of the province legislation are presented in the appendix.[1]

Original manuscript copies of what we now describe as the "Cutt Code" and the "Cranfield Code" have survived from the time of their enactment in the archives of the province and state of New Hampshire. There is evidence, however, that the most accomplished jurists of the state a hundred years ago were not aware of their existence. In a collection of extracts from the writings of Chief Justice Jeremiah Smith, edited by his son, Jeremiah Smith, now a professor in the Harvard Law School, and published in 1879, in the volume known as Smith's Decisions, the editor remarks as follows in a marginal note:

"In a . . . charge to the grand jury, Judge Smith expressly stated that he had never been able to find the codes of law enacted by the New Hampshire Assembly in 1679-80 and in 1682."[2]

As stated in the notes accompanying the acts of the time of Cutt and Cranfield, no definite evidence has been discovered in the English archives to determine whether the laws known as the "Cutt Code" and the "Cranfield Code" were formally disallowed by the king in council. That question still remains unsettled.

It is not open to question, however, that the laws enacted by the general assembly by authority of the Cutt commission were to remain in force until the king's pleasure in respect to them might be announced, after their submission to and examination in the privy council. If, therefore, it is not shown that such laws were changed or disallowed by the king in council, it must be admitted, by virtue of the royal edict declared in that commission, that they were to be considered as remaining in operation until the king's pleasure should be made known to the contrary. (Cutt commission, *post*, p. 6.)

[1]Principal text of this volume, *post*, pp. 48-92; Appendix F, *post*, pp. 788-809.

[2]Decisions of the Superior and Supreme Courts of New Hampshire, from 1802-1809, and from 1813-1816, Selected from the Manuscript Reports of the Late Jeremiah Smith, Chief Justice of Those Courts, with Extracts from Judge Smith's Manuscript Treatise on Probate Law, and from His Other Legal Manuscripts, p. 529, note 2. See also statement by Salma Hale, Judicial History of New Hampshire before the Revolution, *Monthly Law Reporter*, October, 1855; *Id.*, reprint, 3 Grafton and Coös Bar Association Proceedings, 64.

The next question will be as to their repeal or amendment by subsequent legislation in the general assembly of the province; and, finally, in the absence of sufficient evidence of such repeal, or any amendment, a question would arise involving the presumption of repeal by lapse of time and disuse. The legal effect of an apparently general disregard of these particular laws in the time of the later administrations is presented for consideration. There is evidence that they had, at a date not long subsequent to that of their passage, become obsolete, if, indeed, they had not been generally and correctly supposed by contemporaries to have been positively disallowed by the king, the record of the fact being now lost or buried in the ancient archives of state. (Note preliminary to the laws enacted under the commission of Samuel Allen, *post*, p. 518.) It may be remarked that the theory of implied repeal of statutes by disuse does not receive much encouragement in the authorities. (Dwarris on Statutes, ed. 1871, p. 154.) Under the Cranfield commission (*post*, p. 50), while the language to the point is not quite as explicit as it is in the Cutt commission, it is evidently the expressed intention that the laws passed by the lieutenant-governor, with the advice and consent of the council and assembly, were to continue until disallowed by the king in council. Pending the consideration of the laws passed in the first part of the government of Lieutenant-Governor Cranfield, and by him transmitted to the home government, it would seem that the opinion which he entertained was contrary to the one above ventured. He plainly suggested that the laws which he had passed ought to be disallowed. He says, "Meantime I govern them by the laws of England." (*Post*, p. 58.) The implication here seems to be that he did not regard the acts, which he himself had approved and sealed, as valid and operative until approved by the king. In the instructions accompanying the Andros commission, 1686, (*post*, p. 157) it is stated that "all laws, statutes, and ordinances within our territory and dominion of New England shall continue and be in full force and vigor, so far forth as they do not in anywise contradict, impeach, or derogate from our commission, orders, and instructions, until such time as, with the advice and consent of the council, you [the governor] shall pass other laws for the good government of our said territory and dominion, which you are to do with all convenient speed." This is assuredly evidence of a recognition of the laws previously enacted in the colonial legislatures of New England as still valid. The commission and instructions to Governor Andros have always been regarded, from the New England point of view, as an arbitrary and far-reaching encroachment upon the rights of local self-government established here by the colonists, and which they had successfully maintained from the

period of the first settlements down to 1679. Yet the concession in the instructions allowing the "laws to continue in force till others should be made," and the article in the commission which directed that the governor and council should enact "laws and statutes and ordinances . . . as near as conveniently may be agreeable to the laws, statutes, and ordinances of this our Kingdom of England," are certainly of a conservative character, and, considered apart from other and admittedly obnoxious provisions of the Andros commissions, they do not sustain the extreme arguments that have been advanced to the effect that the laws in force in the time of the inauguration of the Andros government were summarily repealed by royal edict, or by any act of the legislative council of the Andros government. Article 10 of the Andros instructions and Article 14 of the Cutt Code, it will be observed, are very similar in terms and legal effect.

The Laws of England and the Compilations in Use in the First Years of the Province Government, 1679-1686.

It appears from the New Hampshire correspondence preserved in the English archives that a copy of some edition of the statutes of England was in the custody of the province government as early as May 14, 1681, when Mr. Secretary Chamberlain employs these words in a letter to the Lords of Trade and Plantations: "the King having sent a great Volume of Laws copiously and accurately done to their hands." Mr. Chamberlain's argument was that, inasmuch as this book of laws was available to the officials of the province, the formulation and enactment of other and local laws for the province was entirely unnecessary. Lieutenant-Governor Cranfield, in a letter of October 22, 1682, referring to the administration of the oaths of office to his councillors, says that "wanting the Statute Booke could not Subscribe ye Test, which was don the next meeting." The inference from this statement must be that a "Booke" was produced on the occasion which is referred to as the "next meeting." It will doubtless be found advantageous to identify the particular edition or editions of the English statutes employed by those who had to do with the compilation of the earliest codes of New Hampshire province law, or which were certainly accessible to them. Among the collections of statutes which had been published in the years recently prior to the establishment of the Cutt presidency in 1679, were the two described as follows:

(1) A collection of all the statutes now in use by F. Pulton . . . with a continuation of the statutes . . . of Charles the First . . . and . . . Charles the Second . . . to the last ad-

journment of parliament April the 11th, 1670. As also, a necessary table or Kalendar to the whole work . . . by F. Manby, B. L., pp. 1537.

Assigns of J. Bell and C. Barker; London, 1670, fol.

(British Museum Catalogue, 506, n. 1.)[1]

(2) The Statutes at Large in paragraphs from Magna Charta until this time (27 Charles II) carefully examined by the Rolls of Parliament with the titles of such statutes as are expired, repealed, altered or out of use. Together with the heads of Pulton's or Rastall's abridgments on the margin, and the addition of above five hundred new references from other books of law and a new table. By J. Keble, B. L., pp. 1472.

Assigns of J. Bell and C. Barker; London, 1676, fol.

(British Museum Catalogue, p. 506, n. 2.)[1]

The special importance of these two editions is that the first seems to have been in actual custody and use by the Cutt administration in this province (1 Province Papers, 383); and the other was the edition used in the home government in the preparation of the commission and instructions to Lieutenant-Governor Cranfield. By comparing the above citations, p. 383, lines 5, 6, and 7, with Pulton's Collection, edited by Manby, 1670, copy in the British Museum, it will be noted that in that collection (i. e., Manby's Pulton) the marginal citation or annotations to chapt. 29, p. 4, where the text of the act of 9 Henry III is printed, afford the proof, due allowance being made for wrong punctuation and other clerical errors in the American manuscript and printed copy of the Cutt code, that the writer of the paragraphs appearing in the last part of page 382 and at the top of page 383, 1 Province Papers, must have had the text of Manby's Pulton before him. It was undoubtedly Manby's Pulton (ed. 1670) that Mr. Chamberlain referred to as the "Great Volume" of the laws of England that was in the possession of the Cutt government in the province of New Hampshire, 1679 to 1681. (Letter, Richard Chamberlain to Wm. Blathwayt, May 14, 1681.) This is the earliest printed book that can be regarded, on our present information, as having ever belonged to a state library of the province of New Hampshire. Passing on in the text of 1 Province Papers, it will be observed on page 444, at a point which appears to be at the conclusion of the text of Lt. Gov. Cranfield's instructions, prepared in England, of course, by the officials of the home government, that quotation is made from the act of 16 Charles I, Statute Book, p. 1108, section 5; "Be it likewise declared, etc." There is conclusive internal evidence that Keble's edition, 1676 (and not

[1]See also this volume, *post*, Appendix A, II, pp. 726-736.

Manby's Pulton), was the one from which this extract was made from the "Statute Book" by the officers of the colonial department of the home government in England in the spring of 1682. The language quoted appears on p. 1108 of Keble's ed., 1676. Furthermore, the citations to ch. 29, 9 Henry III, Keble's ed., p. 4 (1676), are more numerous than the corresponding citations to the same act in Manby's Pulton (1670), p. 4. This fact also identifies the edition of 1676 as the one from which quotation was made for the text found on p. 444, 1 Prov. Papers. In addition to the foregoing evidence of identification is the fact that the citation, 16 Charles I, is an error which appears in and is peculiar to Keble's ed. It should have been named as 17 Charles I. As the error which appears in Keble's edition, 1676, is repeated in the transcripts, 1 Prov. Papers, 444, an additional proof is afforded that the home government, in 1682, in its Cranfield correspondence, was using Keble's ed. of the Statutes at Large, while the same considerations also tend directly to the conclusion that the Cutt government, in the formulation of the Cutt code, and Secretary Chamberlain in his correspondence in 1680, were making use of the Manby's Pulton edition of the Statutes, 1670, and that this edition was the one in possession of the province government in the period of 1679 to 1681.

It is presumable, moreover, that the same volume continued to be the most important printed book in the province library, if not the only one, for an indefinite time in that part of the colonial period, unless, as is quite possible, a copy of Keble's edition was added by transmission from England in 1682, accompanying the instructions to Lieutenant-Governor Cranfield.

If, as indicated by the title lines, *post*, p. 57, a compilation containing the passage as quoted from the Statute Book, p. 1108, section 5, was forwarded with the instructions to Lieutenant-Governor Cranfield, that volume was undoubtedly a copy of Keble's edition of 1676. While it seems that there is little room for mistake in these conclusions, it is not disputable that a question may be raised as to why the edition of 1676 should not have been the one in use in our province in 1679 and 1680 instead of the edition of 1670; and why a later edition than that of 1676 should not have been in evidence in the preparation of the instructions to Cranfield in 1682. These are suggestive questions, but not of superior importance unless the answers should impair the validity of our conclusions as to the identity of the editions used respectively by the Cutt government in 1679 and 1680, and by the officers of the home government in 1682, for the purpose already considered in this monograph. There may have been at that time a longer period actually intervening be-

tween the date assigned to the book on the title page and the date of its actual issuance from the hands of the publishers than would be expected in bringing out similar works in these days. These considerations, however, may be postponed at this time for further historical investigation, as they are not essential to the inquiries as to which edition of the statutes of England was the subject of reference on pp. 383 and 444, Province Papers, vol. 1.

It is to be regretted that the identical copies of these compilations, Manby's edition of 1670 and Keble's edition of 1676, could not have been preserved in the archives of the province, and thence transmitted to the present library of the state.[1]

THE DOMINION OF NEW ENGLAND. THE PERIOD OF LAW-MAKING BY A COUNCIL APPOINTED BY THE CROWN, 1686-1689.

The remarkable experience of the people of New Hampshire in the four years of the co-operative administration of Cranfield and Mason served to reconcile them to almost any prospective or possible change of government. The colonies of New Plymouth, Massachusetts Bay, Connecticut, and Rhode Island might well regard with dismay the prospect of an extension of such a system and such methods over a consolidated New England as Lieutenant-Governor Cranfield had represented and exploited in New Hampshire. In the events which followed the inauguration of the government of the Dominion of New England, under the preliminary administration of the Dudley presidency and council, and the permanent administration of Sir Edmund Andros, the people of New Hampshire encountered and experienced conditions in favorable contrast with those which obtained from 1682-1686; while the people of the other colonies had the nearer perspective which their own experience in colonial self-government had afforded. The relations of this province to the government of New England are necessarily involved with those of the other colonies, and are not easily differentiated from the complex politics of that important transitional period. The record is extended in that part of the text of this work which is devoted to the Dominion of New England, with a view to a complete presentation of the legislation of the period, to be read in connection with the commissions and instructions issued to those to whom the government was committed. Original documents are included in this collection which have not heretofore appeared in Amer-

[1]An original copy of Keble's edition has been recently procured for the state library at Concord, and efforts are being made to add an original copy of Manby's edition of 1670.

ican publications.[1] The material for this part of the work has been sought in the archives at Washington, Philadelphia, and London,[2] and in all the states which, in their early colonial status, were included in the Dominion of New England.

NEW HAMPSHIRE WITHOUT A PROVINCE GOVERNMENT, 1689-1690.

This brief but historically interesting interval is specially noteworthy in one particular, if in no others. It illustrates the adaptability of the New Hampshire system of town government, as then developed, in meeting the strain of serious emergencies in government. At this time a revolution was in progress in the mother country, and another in the Dominion of New England. All external governmental functions had ceased to be operative in relation to these towns. Years of experience in the exercise of local powers and methods, however, had made the people of these towns intelligent and self-reliant masters both of practical and theoretical civics. An interesting product of this exigency was the plan of confederation which was formulated by the leading men of the towns, but which failed through the refusal of a controlling party in the town of Hampton to ratify it. The instrument indicates the views of representative men of the four towns on various practical questions in statecraft. The document is a comparatively recent discovery. The notes of Judge Bell and the monograph of Mr. Tuttle, which constitute Appendix I, reflect the results of careful, critical, and competent investigation of this unique but somewhat obscure period in the political history of the province, the article of Mr. Tuttle being directed more specifically to the form of government proposed in the articles of confederation, and to the history of the ancient document which, it appears, had been preserved for some two hundred years in the papers of his family.[3]

THE PERIOD OF THE SECOND UNION OF THE NEW HAMPSHIRE TOWNS WITH MASSACHUSETTS BAY, 1690-1692.

Without the contribution which the Massachusetts archives afford for the statutory history of the province of New Hampshire, a hiatus of more than two years would have existed in the otherwise continuous record of legislative enactments actually operative here under successive governments. The problem of selection, from a large mass of records, of that which was pertinent to a collection of statutes, resolves, and orders for this province was one of no little

[1] *Post*, pp. 93, 146, 155, 644, 830, 859.

[2] Principal text of this volume, *post*, pp. 98-258; Appendix H, *post*, pp. 829-842.

[3] Principal text of this volume, *post*, pp. 259-266; Appendix I, *post*, pp. 843-847.

difficulty. The rules of inclusion and exclusion adopted and applied in the compilation are stated and explained in the notes which precede the abstracts for the so-called inter-charter period. The necessity for the presentation of extensive transcripts from these records is emphasized by the fact that the Whitmore compilations of Massachusetts Bay statutes, which were published in 1887 and 1889, contained nothing later than 1684, the year of the abrogation of the first Massachusetts Bay charter, while the Goodell series of the Province Laws of Massachusetts begins with the acts of the general court upon the inauguration of a government in 1692, which included both Massachusetts Bay and Plymouth Colony under the second charter. It will be observed that the entire period between the termination of the Andros administration in April, 1689, and the beginning of that of Sir William Phipps in 1692, is included in this work.[1]

The legislation of the general court of Massachusetts Bay in the period which intervened between the termination of the Andros government in the spring of 1689 and the beginning of that inaugurated in the spring of 1692, under the charter of 1691, was somewhat tentative, and none of the acts, resolves, or orders of those three inter-charter years are to be found in the form of engrossed acts in the archives of the commonwealth.

The Province Government of New Hampshire Revived and the Legislative Assembly Restored, 1692.

The extended notes relating to the governments administered from 1692 to 1699 under the commission of Samuel Allen, and from 1699 to 1702 under the commission of the Earl of Bellomont, and the statutes enacted by the general assembly in that period, render superfluous a further elaboration of the same subject in this introductory statement.

The most logical as well as the most convenient point of division between the material to be employed in this volume and that intended to be incorporated in the next in order in the series is at the termination of the government under the Bellomont commission, and the beginning of that under the last commission to Joseph Dudley.[2]

The Province Legislature.

At the time of the establishment of the province of New Hampshire the conflict between the people of the Massachusetts Bay colony and the home government was well advanced, involving the issue whether the existing charter government should be retained, or something more in conformity with the

[1]Principal text of this volume, *post*, pp. 267-498.

[2]Principal text of this volume, *post*, pp. 499-709; Appendix J, *post*, pp. 856, 857.

present policy of the king substituted. The form of government prescribed in 1679 for New Hampshire cannot, in the light of the events of the succeeding ten years, be regarded as fairly indicating, if, indeed, it even suggested what was to be the nature or extent of the repressive measures in contemplation by the Stuarts in the event of a general change of the forms and principles of colonial government in the other New England plantations. In the government established by the Cutt commission two legislative branches are recognized, the members of one appointed by the crown, and the members of the other elected by the people. This legislative body, which from the beginning of the province is styled the general assembly, was authorized to enact laws, the house of deputies proceeding with the advice and consent of the president and council. (*Post*, p. 6.) The Cranfield commission had a similar provision, but in terms somewhat more explicit and somewhat more in detail. It was stated in the legislative article that the lieutenant-governor, with the advice and consent of the council and assembly, should have power to make laws, etc. (*Post*, p. 50.) One noteworthy difference between the Cutt commission and the Cranfield commission, at the point under consideration, is that, in the first, predominance in the law-making body is apparently, if not intentionally, given to the deputies, while in the second, or Cranfield commission, the order is reversed, the council and deputies being subordinated to the lieutenant-governor.

The popular branch of the assembly is not recognized by the commissions for the Dominion of New England, 1686-1689. That element in the legislative history of the colonies is the subject of special comment in the notes, pp. 93, 100, 144, and 182 of this volume. The annual election of deputies in the time of the Cutt government was provided for by Article 44 of the Cutt Code. (*Post*, p. 37.) The annual meeting of the general assembly was in like manner fixed for the first Tuesday of March. The veto power and the right to dissolve the general assembly were first committed to a New Hampshire governor in specific terms by the Cranfield commission. (*Post*, p. 51.) The same powers reappear in the Allen commission (*post*, p. 504) and in the Bellomont commission (*post*, p. 614). In the earlier commissions there is some confusion in the employment of the term "general assembly," and some uncertainty as to its application. This will be observed in a comparison of the use of the term in the Cutt commission, the Cranfield commission, and in the enacting clauses of the act of 1692, which is chapter 1, p. 524, *post*, and the act which is chapter 2, p. 526, *post*. Finally, however, it is evident that the relations of the governor, council, and representatives, as parts or branches of the legislative body, were made certain and

became fixed in the time of Bellomont and Partridge.[1] The first act of that administration (*post*, p. 653) contains the formula,—"enacted by his Excellency the Governor, Council, and Representatives, convened in General Assembly." Some authorities make a distinction between laws and acts, assigning one of these terms to the original enactments of a colonial legislature, and the other to those only which may have been confirmed by the king in council. This distinction has not been followed in this work, as the uncertainty which still exists as to whether certain of the earlier acts were confirmed, disallowed, or ignored renders the attempt to apply it in many instances impracticable. The methods provided in determining the limits of time occupied by each consecutive general assembly, and assigning to each its proper number in regular chronological order, are explained in notes to the later text of this volume. (*Post*, pp. 9, 523.)

The constituencies of the first province legislatures were, in regard to the extent of the population, even after a lapse of fifty-six years from the time of the first settlement, still of very limited proportions. Article 9 of the Cutt Code (*post*, p. 25) restricted the franchise in the election of deputies to electors who were qualified in all the following particulars, viz.: by being Englishmen and Protestants; by having taken the oath of allegiance to His Majesty; by having been duly admitted to the liberty of being freemen of the province (the class legally termed freemen in New Hampshire not being limited by church membership); by being twenty-four years of age, not vicious of life but honest and of good conversation; and by possessing £24 of ratable estate. It is stated by Mr. Tuttle, Historical Papers, p. 186 (this volume, *post*, p. 776), that the population of the province at this time was only about 4,000. (See also Dow's History of Hampton, p. 99.) Mr. Bancroft estimates the population of New Hampshire in 1688 as 6,000. 1 History U. S., ed. 1883, p. 608. It is a valuable feature of the surviving records that presents the full text of the order of the president and council of February 16, 1679-80, designating the persons in each of the four towns authorized to vote for deputies to be members of the first general assembly. This list appears in this volume, *post*, pp. 13, 14, 15.

The term "general court," which is now the official designation of the state legislature of New Hampshire, is a colonial survival, derived, as is the same term employed in the Massachusetts constitution, from the terminology of the first legislatures of the colonial period. The origin of that term must be sought in the history of other English institutions as well

[1] "The Colonial Origins of New England Senates," by F. L. Riley, is the title of an instructive paper, appearing in Series 14, Johns Hopkins University Studies in Historical and Political Science. *Id.* pamphlet edition, part devoted specially to New Hampshire, pp. 40-53.

as colonial legislatures. The term "general assembly," as descriptive of the legislative body in this province, is correctly applied only in the period from 1679 to 1775. The general assembly ended with the province government.

THE TABLES OF REGNAL YEARS AND OF OFFICIAL SUCCESSION.

The tables which precede the principal text of the commissions and statutes are included in the compilation, in order to obviate, as far as practicable, the inconvenience of frequent resort to works of reference by those who have occasion to use a volume of this character for the identification of the dates intended by the mention of regnal years against the text of the English and colonial statutes. It is assumed, also, that a like useful purpose would be subserved in placing the tables of regnal succession, and the years covered by each colonial administration, in equally accessible place and arrangement for reference in the introductory divisions of the volume.

THE CONTINUATION OF THE SERIES.

The material for a second volume of the laws of the province, intended to be arranged and presented on a plan similar to that adopted for this volume, has been collected, and considerable progress already made in putting it in orderly form for printing and publication.

THE COMMISSIONS AND INSTRUCTIONS GOVERNING THE PROVINCE ADMINISTRATIONS AND PROVINCE LEGISLATION.

Inasmuch as the commissions and instructions which were from time to time issued for the direction of the governors of the province are to be regarded, until revoked or modified, as the organic law governing the exercise of all the powers of executive, legislative, and judicial administration, more space than is usually assigned to that class of colonial documents, in the recent compilations of province laws by other states, has been devoted to them in this work. The assembling of these documents for each administration has been as complete as possible in all cases wherein the student might be expected otherwise to find difficulty in consulting them. The exceptions include such documents as the first and second colonial charters of Massachusetts, which can readily be consulted in a number of works published by the commonwealth of Massachusetts and the federal government, and which have been widely circulated.